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# THE USE OF ARTICLE 31(3)(C) OF THE VCLT IN THE CASE LAW OF THE ECtHR: AN EFFECTIVE ANTI-FRAGMENTATION TOOL OR A SELECTIVE LOOPHOLE FOR THE REINFORCEMENT OF HUMAN RIGHTS TELEOLOGY?

## BETWEEN EVOLUTION AND SYSTEMIC INTEGRATION

*Vassilis P. Tzevelekos\**

INTRODUCTION .....	622
I. THE RISK OF NORMATIVE FRAGMENTATION: NEW PROBLEMS, OLD CONTRIVANCES.....	628
A. <i>The Fragmentation Dichotomy: Towards a Telos?</i> .....	628
B. <i>Article 31(3)(c) and Its Late Elevation to an             Anti-Fragmentation Tool: A Servitore di due Padroni?</i> .....	630
II. INTERPRETING THE ECHR: PLURALISM WITHIN A DUALIST DÉCOR .....	637
A. <i>The Dualist Confines of Pluralism in the Means of             Interpretation</i> .....	637
B. <i>The Dualist Confines of the Special Nature             of the ECHR</i> .....	641
III. THE USE OF ARTICLE 31(3)(c) IN ECtHR CASE LAW .....	645
A. <i>Normative Aspects</i> .....	647
1. The Complementary Role of International Law: Pseudo-Systemic Integration? .....	647
2. Conflict Between Norms of International Law and the ECHR .....	665
3. Resort to (General) International Law for Questions Outside the ECHR's Subject Matter .....	670

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\* Research Scholar, University of Michigan Law School; Attorney, Athens' Bar; M.Res, European University Institute (Italy); M.A., European Political and Administrative Studies, College of Europe (Belgium); DEA Droit international public et organisations internationales, Paris 1 Panthéon-Sorbonne (France); LL.B., National and Kapodistrian University of Athens (Greece). The author is grateful to Professor Pierre-Marie Dupuy, Professor Petros Mavroidis, Professor Ole Spiermann, Professor Mark Toufayan, and Mr. Vaios Koutroulis for their constructive comments on earlier drafts. The Article also benefited from questions from participants at symposia, workshops, and conferences at the European University Institute, University of Oslo, Columbia Law School, and the University of Macedonia (Hellenic Society of International Law). Author welcomes comments by email to [Vassilis.Tzevelekos@EUI.eu](mailto:Vassilis.Tzevelekos@EUI.eu). The usual disclaimer applies.

B. Institutional Aspects: Abuse of the Systemic  
Integration Technique? .....680  
CONCLUDING REMARKS: ATTEMPTING A SYNTHESIS.....685

*That nostalgia for unity, that appetite for the absolute illustrates the essential impulse of the human drama. But the fact of that nostalgia's existence does not imply that it is to be immediately satisfied. For if, bridging the gulf that separates desire from conquest, we assert with Parmenides the reality of the One (whatever it may be), we fall into the ridiculous contradiction of a mind that asserts total unity and proves by its very assertion its own difference and the diversity it claimed to resolve. This other vicious circle is enough to stifle our hopes. . . . So long as the mind keeps silent in the motionless world of its hopes, everything is reflected and arranged in the unity of its nostalgia. But with its first move this world cracks and tumbles: an infinite number of shimmering fragments is offered to the understanding.*

. . .

*I can negate everything of that part of me that lives on vague nostalgias, except this desire for unity, this longing to solve, this need for clarity and cohesion. I can refute everything in this world surrounding me that offends or enraptures me, except this chaos, this sovereign chance and this divine equivalence which springs from anarchy.*

Albert Camus, *The Myth of Sisyphus*

INTRODUCTION

*Judges must take cognizance of the dangers of legal fragmentation, and of inconsistency in the case-law, as a result of the quasi-anarchic proliferation of international courts.<sup>1</sup>*

Admittedly, beginning an article on the fragmentation of international law with these words of former President of the International Court of Justice (ICJ), Judge Gilbert Guillaume, is a good way to encourage any cursory reader to put the work aside. Although

1. Gilbert Guillaume, President, International Court of Justice, The Proliferation of International Judicial Bodies: The Outlook for the International Legal Order, Address Before the G.A. of the U.N. (Oct. 27, 2000), <http://www.icj-cij.org/court/index.php?pr=85&pt=3&p1=1&p2=3&p3=1> (last visited Mar. 26, 2010) [hereinafter Guillaume Address].

platitudinous, such an introduction highlights the debate that has developed around the issue of fragmentation within an institutional environment of cross dynamics. The first example President Guillaume offered in proof of his conclusion was the European Court of Human Rights' (ECtHR) 1995 decision on the preliminary objections of the *Loizidou* case,<sup>2</sup> criticizing the Strasbourg Court for adopting a different position than the ICJ on the effect of territorial reservations with respect to the European Convention of Human Rights (ECHR).<sup>3</sup> In fact, not only did the ECtHR remain silent regarding the relevant ICJ case law, it also described, remarkably explicitly, the so-called special character of the ECHR, stating that Strasbourg judges "must bear in mind the special character of the Convention as an instrument of European public order (*ordre public*) for the protection of individual human beings."<sup>4</sup>

Notably, the ECtHR had provided a response to President Guillaume's criticisms as early as 1996. Almost four years before being accused of threatening the normative unity of general international law, the ECtHR stated in its judgment on the merits in *Loizidou*:

[T]he [European] Convention must be interpreted in the light of the rules of interpretation set out in the Vienna Convention of 23 May 1969 on the Law of Treaties and [ ] Article 31 § 3 (c) of that treaty indicates that account is to be taken of "any relevant rules of international law applicable in the relations between the parties" . . . . In the Court's view, the principles underlying the Convention cannot be interpreted and applied in a vacuum. Mindful of the Convention's special character as a human rights treaty, it must also take into account any relevant rules of international law . . . .<sup>5</sup>

Then and now the ECtHR seems to be making a clear point: it has consistently denied breaching any of its traditional ties with general international law, and has always maintained that the mission of its judges is to interpret the ECHR in the light of the international legal order. However, as will be shown below, creating an equilibrium between the special character of the ECHR and its subordination to the logic and economy of the international legal system is a difficult task. This Article

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2. *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. A) at 31 (1995) (decision on the preliminary objections).

3. Guillaume Address, *supra* note 1 (citing Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature*, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) [hereinafter ECHR]).

4. *Loizidou*, 310 Eur. Ct. H.R. (ser. A) at 31 (decision on the preliminary objections).

5. *Loizidou v. Turkey*, 1996-VI Eur. Ct. H.R. 2216, 2231, ¶ 43 (judgment on the merits) (citing 1969 Vienna Convention on the Law of Treaties art. 31(3)(c), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]).

seeks to evaluate the ECtHR's tacit and explicit applications of Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT).<sup>6</sup> The International Law Commission (ILC) quite recently brought Article 31(3)(c) to the fore by suggesting that it introduces an autonomous method of interpretation—namely systemic integration.<sup>7</sup> However, as will be argued below, the history of Article 31(3)(c), both in terms of the original vision of its drafters and the role it plays in the practice of the ECtHR, suggests it may be useful for other interpretative purposes. Taking these preliminary remarks into account, this Article considers three main questions: (1) How effective can Article 31(3)(c) be as a remedy against the fragmentation of international law? (2) To what extent may Article 31(3)(c) accommodate techniques of interpretation other than that of systemic integration? And (3), how should the relationship between these distinct interpretative methods be conceptualized?

There are three reasons for choosing the normative environment of the ECHR to test the effectiveness of Article 31(3)(c) of the VCLT. First, it is useful to do so in order to investigate the following oxymoron: among specialized international judicial institutions, the ECtHR is often accused of fragmenting international law yet invokes Article 31(3)(c) the most frequently.<sup>8</sup> Indeed, in comparison with other international courts and tribunals, the ECtHR's case law offers a remarkable illustration of explicit references to the article, some of which go back several years before it emerged as an anti-fragmentation tool.

Secondly, the effectiveness of the ECHR system for the protection of human rights and the way this effectiveness is reinforced by the legitimacy of its humanistic *telos* turns it into a potential communicant of *droitdelhommisme*, or “human rightism”—the famous neologism intro-

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6. VCLT, *supra* note 5, art. 31(3)(c) (“There shall be taken into account, together with the context: . . . any relevant rules of international law applicable in the relations between the parties.”).

7. According to this method of interpretation, each *instrumentum* of international law must be interpreted and applied in a manner that safeguards harmony within the broader normative environment—that is, the international legal order. As explained in Part I.B, *infra*, this particular method of interpretation has recently been promoted by the International Law Commission (ILC) and legal scholarship as one of the main tools for counteracting the normative fragmentation of international law. It is widely regarded as one of the main channels that enable the concurrence between special and general international law.

8. See Jean-Marc Sorel, *Article 31: Convention de 1969*, in LES CONVENTIONS DE VIENNE SUR LE DROIT DES TRAITÉS: COMMENTAIRE ARTICLE PAR ARTICLE 1289, 1322 (Maxime Didat ed., 2006). See also the reprobative comments made by former President of the International Court of Justice (ICJ) in Robert Y. Jennings, *The Proliferation of Adjudicatory Bodies: Dangers and Possible Answers*, in IMPLICATIONS OF THE PROLIFERATION OF INTERNATIONAL ADJUDICATORY BODIES FOR DISPUTE RESOLUTION 2, 5–6 (Am. Soc’y Int’l L. Bull. No. 9, 1995), who argues that the *Loizidou* decision on preliminary objections is evidence of the danger of fragmentation of international law due to the proliferation of international courts and tribunals.

duced and used by Pellet to criticize that part of international legal scholarship which, in his view, actively and militantly promotes the idea of human rights as “idiosyncratic” within international law.<sup>9</sup> However, scholarly criticism of the ECtHR extends well beyond the classification of its system as a self-contained regime.<sup>10</sup> The ECtHR not only knowingly disregards general international law, but it also intentionally introduces into international law elements that are foreign to its traditional, state-centric structures and that international law cannot accommodate. The moral weight of the system of the ECHR, the ECtHR’s voluminous case law, and especially its effectiveness in the implementation stage (with certain well-known exceptions), transform the ECtHR from a modest regional international judicial institution with a specialized competence into an influential systemic player. It is in this capacity that critics such as President Guillaume reproach the fact that the ECtHR refuses to accept the role of a compliant recipient of the dictates of general international law, and instead asserts its right to actively participate in the process of this general international law’s interpretative evolution.<sup>11</sup> Thus, in addition to expressing concern for the ECtHR’s role in fragmenting international law, its critics fear that the court stimulates the so-called “humanization” of international law.<sup>12</sup> Although measuring

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9. See Alain Pellet, “Human Rightism” and International Law, 2000 ITALIAN Y.B. INT’L L. 3. Despite his diplomacy, Pellet clearly accuses the “human rightist” scholarship of promoting the “idiosyncrasy” of human rights, as well as “tak[ing] their desires for realities . . . as legal truths.” *Id.* at 5.

10. On the origins of the term, see Bruno Simma, *Self-Contained Regimes*, 1985 NETH. Y.B. INT’L L. 111. The term’s actual content has been defined amply. In legal scholarship, the term “self-contained regime” has been used to imply both an international legal subsystem entirely separate and autonomous from general international law, and a legal subsystem which simply contains a set of *leges speciales* designed to exclude only the application of the general legal consequences of international wrongfulness, that is to say the secondary norms of international law on state responsibility. For more details on these definitions, see Bruno Simma & Dirk Pulkowski, *Of Planets and the Universe: Self-Contained Regimes in International Law*, 17 EUR. J. INT’L L. 483, 490–93 (2006).

11. See Martti Koskenniemi, *The Fate of Public International Law: Between Technique and Politics*, 70 MOD. L. REV. 1 (2007). Koskenniemi explains very eloquently that “[s]pecializations such as ‘trade law’, ‘human rights law’, ‘environmental law’, ‘criminal law’, ‘security law’, ‘European Law’ and so on started to reverse established legal hierarchies in favour of the structural bias in the relevant functional expertise . . . . It is this change to which international lawyers have reacted by speculating on the ‘dangers’ of incoherence, forum shopping and, perhaps characteristically, ‘loss of overall control.’” *Id.* at 4.

12. However, in order to avoid giving the wrong impression, it is important to note that most legal scholarship welcomes the impact of human rights on public international law. The title of Theodor Meron’s 2003 course on public international law at the Hague Academy of International Law speaks for itself. See THEODOR MERON, *THE HUMANIZATION OF INTERNATIONAL LAW* (2006). Judge Bruno Simma devoted his own general course at the Hague Academy in 2009 to *The Impact of Human Rights on International Law*. See Bruno Simma: Principal Publications, <http://www.icj-cij.org/court/?p1=1&p2=2&p3=1&judge=14> (last visited Mar. 26, 2010). For a summarized analysis of the humanizing effects of international

the influence of the ECHR's regime over the broader general system is beyond the scope of this Article, what can be legitimately presumed here is that whenever the court relies upon its so-called *pro-homine* specialty to diverge from the economy of the broader international legal order and turn a deaf ear to the tempo given by its premier institutions (as it did in *Loizidou*),<sup>13</sup> then not only does it fragment the unity of this broader legal order but it also challenges the fundamentally state-centric (which is not to say voluntarist) premises on which it is based. An effective Article 31(3)(c) (at least in the sense that the ILC promotes) requires that the Strasbourg Court—a regional court entrusted with the interpretation of a “special” convention—identify the center of gravity of its system as outside its microcosmos, in order not to threaten the whole systemic (if arguably indiscernible) symphony.

The third and final reason to assess the effectiveness of Article 31(3)(c) within the paradigm of the ECHR relates to its idiosyncratic nature, which is marked by inherent centrifugal tensions that render it susceptible to fragmentation. Formally, the ECHR is a typical multilateral international treaty. As such, it is the product of general international law—both its own binding force and its normative qualities stem from the same general international law. However, at the same time, the Convention presents the qualitative—both normative and socio-political—characteristics of what will be described *infra* as a multi-level specialty. Although an international treaty, the ECHR also serves as a regional quasi-constitution<sup>14</sup> that delimits an increasingly integrated public order,

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human rights on general international law, see Menno T. Kamminga, *Humanisation of International Law*, in *CHANGING PERCEPTIONS OF SOVEREIGNTY AND HUMAN RIGHTS: ESSAYS IN HONOUR OF CEES FLINTERMAN* 29 (Ineke Boerefijn & Jenny Goldschmidt eds., 2008). For a collection of essays on the topic, see *THE IMPACT OF HUMAN RIGHTS LAW ON GENERAL INTERNATIONAL LAW* (Menno T. Kamminga & Martin Scheinin eds., 2009).

13. See, e.g., Pierre-Marie Dupuy, *Preface to L'INFLUENCE DES SOURCES SUR L'UNITÉ ET LA FRAGMENTATION DU DROIT INTERNATIONAL*, at viii (Rosario Huesa Vinaixa & Karel Wellens eds., 2006) [hereinafter *L'INFLUENCE DES SOURCES*] (discussing that, while manifestly careful not to outpace the *opinio juris* of states, the ICJ's case law seems to be setting the tempo of the evolution of general international law).

14. The debate about the constitutional functions of the European Court of Human Rights (ECtHR) is long standing and still open. See, for example, the article by the former President of the ECtHR, Luzius Wildhaber, *A Constitutional Future for the European Court of Human Rights?*, 23 *HUM. RTS. L.J.* 161, 165 (2002) (arguing that the ECtHR should limit its decisions to “‘constitutional’ decisions of principle”). One of the first works to examine the question was Jean-François Flauss, *La Cour européenne des droits de l'homme est-elle une cour constitutionnelle?*, in *LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME: DÉVELOPPEMENTS RÉCENTS ET NOUVEAUX DÉFIS* 69 (Droit et justice collection dirigée par Pierre Lambert No. 19, Jean-François Flauss & Michel de Salvia, eds. 1997). See also Robert Harmssen, *The European Court of Human Rights as a 'Constitutional Court': Definitional Debates and the Dynamics of Reform*, in *JUDGES, TRANSITION, AND HUMAN RIGHTS* 33, 41 (John Morrison et al. eds., 2007) (highlighting the “systemic turn” in the case law of Strasbourg, in which the ECtHR has focused on specific human rights protection problems); Wojciech

and seeks to protect certain values within a very specific geographic, cultural, social, political, and economic *milieu*, namely the European continent. Hence, the ECHR's so-called specialty is not limited to its human rights teleology and the *erga omnes partes* normative quality of its substantive provisions—which, moreover, are characteristics common to all human rights conventions. Beyond this obvious dimension of normative specialty, the ECHR is equally special at the socio-political level in that it is called upon to produce results within the particular social context that designed its regime and gave it the tools to gradually help construct common minimum standards in the fields of human rights, democracy, and the rule of law within the single European public order. In short, ECHR regime delimits a particular socio-normative environment in which it is extremely difficult for the systemic integration technique to produce anti-fragmentation results.

Before demonstrating how the case law of the ECtHR gives effect to Article 31(3)(c), it is useful to provide certain theoretical illustrations that can serve as a basis for the analysis that will follow. In Part I the Article will briefly introduce the question of the fragmentation of international law, and will more extensively delineate the role that the ILC attributed to Article 31(3)(c) and the ILC's expectations regarding its success in this role. Next, Part II will give an overview of the special elements of the ECHR socio-normative environment, which gave rise to the case law into which Article 31(3)(c) came into force. The Article will argue that, in addition to benefiting from the very special nature of the ECHR, the Strasbourg Court also has a significant number of interpretative tools that allow it to enjoy wide discretion in the choices it often has to make regarding the dilemma between unconditional integration into the international legal order and its (regional) human rights specialty. Once concluded the theoretical part of the study, the Article will proceed in Part III to test the use of Article 31(3)(c) in the case law of the ECtHR. The object of this Part of the study is to assess the validity of the presumptions that Parts I and II introduced with regard to the function of

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Sadurski, *Partnering with Strasbourg: Constitutionalization of the European Court of Human Rights, the Accession of Central and Eastern European States to the Council of Europe, and the Idea of Pilot Judgments* (Eur. Univ. Inst. Working Paper No. EUI LAW 2008/33, 2008), available at <http://hdl.handle.net/1814/9887> (last visited Mar. 26, 2010) (noting that the enlargement of the Council of Europe is an opportunity for the ECtHR to adopt a quasi-constitutional role by ruling on the systemic defects of domestic legal orders); cf. Louis Favoreu, *Cours constitutionnelles nationales et Cour européenne des droits de l'Homme*, in 1 LIBERTÉS, JUSTICE, TOLÉRANCE: MÉLANGES EN HOMAGE AU DOYEN GÉRARD COHEN-JONATHAN 789, 797 (Luigi Condorelli, Jean-François Flauss, Charles Leben, & Philippe Weckel, eds., 2004) (explaining why the ECtHR does not correspond to the European model of constitutional justice in which constitutional courts are situated outside of the ordinary legal process).



Article 31(3)(c) within a special regime of international law. Part III is structured at two main levels, and will first address the question of normative fragmentation, and second its judicial institutional counterpart. Finally, Part III will consider the evolutive effects of Article 31(3)(c) as these are integrated in the broader question of fragmentation generally, and will treat these effects separately in certain instances, as further delineated in that Part.

## I. THE RISK OF NORMATIVE FRAGMENTATION: NEW PROBLEMS, OLD CONTRIVANCES

### A. *The Fragmentation Dichotomy: Towards a Telos?*

Although the proliferation of international judicial fora has had a beneficial effect on both the development and the effective application and enforcement of international rules, it is also due to this same phenomenon that international law is seen as undergoing fragmentation. "Post-modern anxieties"<sup>15</sup> about the risks of chipping away at the normative unity of international law and of gradually deforming its legal order have added to the more classical selection of worries, and a new theoretical dichotomy has thus entered the discipline. If for a classic or even a modern international lawyer the dilemma was between objectivism and voluntarism, the post-modern generation has to choose between the unity or fragmentation of an international legal order that is becoming increasingly pluralistic while not yet confident enough about its systemic morphology.

All the same, it would not come as a complete surprise to suggest that the whole fragmentation discourse is nothing more than a pseudo-dilemma.<sup>16</sup> In fact, such a view would have the support of the extreme trends of international law. A complete negation of the existence of any international legal order and the defense of its virtually absolute unity and harmony would appear to be two sides of the same coin, neither of which perceive a threat of fragmentation.<sup>17</sup> What, however, should be

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15. See Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT'L L. 553 (2002).

16. See, e.g., Mario Prost, *All Shouting the Same Slogans: International Law's Unities and the Politics of Fragmentation*, 2006 FINNISH Y.B. INT'L L. 131, 152 ("There is no objective or neutral approach to issues of fragmentation. Any discourse on fragmentation reflects certain preferences regarding the nature and function of international law as either rules, language or values.").

17. See Bruno Simma, *Fragmentation in a Positive Light*, 25 MICH. J. INT'L L. 845, 847 (2004) ("To diagnose a process of fragmentation at all logically presupposes that the observer proceeds from an image of international law constituting a whole, something closed and firm, which now threatens to fall into pieces.").

highlighted is that, for the majority of scholars, pluralism means heterogeneity, which—to a large extent—jeopardizes the integrity of the international legal order.<sup>18</sup>

The core, then, of normative fragmentation<sup>19</sup> could be described as a story about normative planets or comets—both in their original general content as well as in the more specific content that they have expressed since judicial interpretation. These planets either follow a course deviating from the international law galaxy or else are to be found on a path to collision with their *Helios*—general international law—which tends to maintain a systemic equilibrium.<sup>20</sup> The former refers to the “special” or “self-contained regimes,” which, regarded from a perspective of *auto-suffisance*, proclaim a *sui generis* right to self-determination, reject the idea that they are part of the international legal order, and deny coming under its structures and general rules. The latter group corresponds to the phenomenon of conflicting or incompatible norms within a highly decentralized international legal universe, without excluding the well-known scenario according to which the same international norm has been given different effect by more than one court.<sup>21</sup>

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18. It should be noted, however, that most scholars emphasize the institutional dimension of that pluralism (i.e., the so-called proliferation of international judicial bodies). See Martti Koskenniemi, *What Is International Law for?*, in INTERNATIONAL LAW 89, 110 (Malcolm D. Evans ed., 2003) (arguing that behind the fragmentation problem there is a “hegemonic struggle where each institution, though partial, tries to occupy the space of the whole”); Tullio Treves, *Fragmentation of International Law: The Judicial Perspective*, 23 COMUNICAZIONI E STUDI 821, 831–32 (2007) (suggesting that “[u]nderneath the discussion [on fragmentation] lies a clash for power between institutions and the persons which partake in the decisions of these institutions. . . . It is a debate on whether the last word on international law questions must belong to the International Court of Justice, on whether specialized or generalist international lawyers are best suited to deal with questions belonging to specialized fields.”); see also ANTONIO CASSESE, INTERNATIONAL LAW 45 (2001) (claiming, more optimistically, that fragmentation is gradually receding thanks to “interpenetration and cross-fertilization of previously somewhat compartmentalized areas of international law”).

19. The ILC’s approach excludes the institutional dimension of fragmentation and only examines the question from a purely normative point of view. See Int’l L. Comm’n [ILC], *Report of the Study Group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, ¶¶ 5–25. U.N. Doc. A/CN.4/L.644 (July 18, 2003); see also Simma, *supra* note 17, at 846 (suggesting that the institutional dimension of fragmentation should exclude the judicial aspect, since “if there are international institutions that are constantly and painstakingly aware of the necessity to preserve the coherence of international law, it is the international courts and tribunals”).

20. See Matthew Craven, *Unity, Diversity and the Fragmentation of International Law*, 2003 FINNISH Y.B. INT’L L. 3, 32 (“‘Fragmentation’ is simply a way of expressing, with certain obvious overtones, a concern that the disciplinary centre can no longer hold the forces of diversity in check.”).

21. Given the institutional dimension of fragmentation and the role of inconsistency in the case law of various international judicial entities, Pierre-Marie Dupuy pleads for “a central role for the ICJ.” See Pierre-Marie Dupuy, *The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice*, 31 N.Y.U. J. INT’L L. & POL. 791, 798 (1999). *Contra* Rosalyn Higgins, *Respecting Sovereign States and Running a*

The ILC pointed out early on that the fragmentation phenomenon, “as an expression of diversification and expansion of international law,” might give rise to both negative and positive results.<sup>22</sup> For the optimists,<sup>23</sup> fragmentation can be understood as an expression of maturity; it is nothing more than a rather painful step towards the *telos* (end/scope/objective) of the systemic integration of the international legal order. On the other hand, the pessimists conceive of this same trend towards fragmentation as evidence of disintegration, incoherence, and disunity, bringing general international law closer to a status of inefficiency and shrinkage, if not to its *telos* (end/termination).

B. Article 31(3)(c) and Its Late Elevation to an  
Anti-Fragmentation Tool: A *Servitore di due Padroni*?<sup>24</sup>

What is important in the context of this Article is not so much whether fragmentation is a threat to the integrity or further integration of the international legal order, or whether it simply corresponds to a necessary and unavoidable step in the evolution of this order, or both. Undoubtedly, any reference to the notion of a legal order structured as a system requires at very least a classification of its normative constituents, as well as a set of mechanisms administering the relationship between these differently classified elements. The notion of hierarchy, which provides solutions to conflicts between norms of different legal standing, needs to be complemented by techniques for the setting of priorities in the case of conflicts between “parallel” rules.<sup>25</sup> This is, for instance, the role of the two classic principles of *lex posterior derogat priori* (that is, that a more recent law overrules an inconsistent earlier law) and *lex specialis derogat generalis* (that is, that a specific law overrules a general law).

In addition to these conflict resolution mechanisms, the ILC followed another route. Taking into account that one of the features

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*Tight Courtroom*, 50 INT’L & COMP. L.Q. 121 (2001) (arguing in favor of judicial decentralization).

22. ILC, *Report of the Study Group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, ¶ 6, U.N. Doc. A/CN.4/L.663/Rev.1 (July 28, 2004).

23. Georges Abi-Saab was one of the first to point out that fragmentation also contains some “healthy” elements. See Georges Abi-Saab, *Fragmentation or Unification: Some Concluding Remarks*, 31 N.Y.U. J. INT’L L. & POL. 818, 925 (1999); see also Kalypso Nicolaidis & Joyce L. Tong, *Diversity or Cacophony? The Continuing Debate over New Sources of International Law*, 25 MICH. J. INT’L L. 1349, 1361–65 (2004).

24. CARLO GOLDONI, *THE SERVANT OF TWO MASTERS* (Jeffrey Hatcher & Paolo Emilio Landi trans., Dramatists Play Service Inc. 2004) (1743).

25. See generally the very interesting course at the Hague Academy of International Law by Emmanuel Roucouas, *Engagements parallèles et contradictoires*, in 6 RECUEIL DES COURS DE L’ACADÉMIE DE DROIT INTERNATIONAL DE LA HAYE (1987).

inherent to fragmentation is that of normative pluralism, especially in the relationship established between general and special norms or regimes, the ILC brought to the fore Article 31(3)(c) of the VCLT. Although initially international legal practitioners were reluctant to implement the article, as fragmentation became more widespread both legal scholarship<sup>26</sup> and the ILC (re)discovered the usefulness of the method(s) laid down in the article—this time as an anti-fragmentation tool.

This provision (the customary nature of which is uncontested),<sup>27</sup> when read in the broader framework of Article 31 of the VCLT, enables the judge of any court or tribunal to integrate general international law into her judicial reasoning, along with any “relevant” and “applicable” special legal obligations which are binding on the parties. In other words, Article 31(3)(c) functions as “a ‘master key’ to the house of international law”<sup>28</sup> and renders possible the inclusion of sources external but relevant to the norm under interpretation, thus allowing the judge to take into account the broader normative environment. It goes without saying that this should always be done following the so-called “principle of harmonization,” according to which, when a plurality of norms affects the same subject the interpretation should always attempt to achieve conciliation.<sup>29</sup>

However, the ILC did not limit itself to simply calling attention to Article 31(3)(c). It went further<sup>30</sup> and recruited the article into the

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26. See Philippe Sands, *Vers une transformation du droit international? Institutionnaliser le doute*, in 4 DROIT INTERNATIONAL 213, 220–30 (Pierre-Marie Dupuy & Ch. Leben, eds., 2000). As Sands argued, Article 31(3)(c) has a general applicability that may cover the relationship between different branches of international law and different norms. *Id.* at 213. According to Sands, Article 31(3)(c) sets up the principle of integration, which seeks unity in international law and requires that norms not be envisaged as isolated from general international law. *Id.* at 222.

27. See, e.g., *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Sen.)*, 1991 I.C.J. 53, 69–70 (Nov. 12). Recently, the ICJ reconfirmed the customary nature of Article 31(3)(c). See *Certain Questions of Mutual Assistance in Criminal Matters (Djib. v. Fr.)*, 2008 I.C.J. 37 (June 4), available at <http://www.icj-cij.org/docket/files/136/14550.pdf> (last visited Mar. 26, 2010).

28. This term was introduced by Xue Hanqin during the ILC debates on the significance of Article 31(3)(c). ILC, *Final Report of the Study Group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, ¶ 420, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) (prepared by Martti Koskenniemi) [hereinafter ILC, *Final Report on Fragmentation of International Law*].

29. On the nature of harmonization, see Nele Matz-Lück, *Harmonization, Systemic Integration, and ‘Mutual Supportiveness’ as Conflict-Solution Techniques: Different Modes of Interpretation as a Challenge to Negative Effects of Fragmentation*, 2006 FINNISH Y.B. INT’L L. 37, 45–47. Starting from the presumption that normative conflicts are not intentional, Matz-Lück concludes that harmonization is neither a technique nor a tool as such. It simply introduces “a concept in need of the employment of subsidiary methods which serve the higher objective of coherence of norms.” *Id.* at 45.

30. Nevertheless, it did not do so until 2005, in accordance with the revised paper submitted by one of its members, Professor Mansfield. See ILC, *Report of the Study Group on*

services of the systemic integration method of interpretation. In this role Article 31(3)(c) *deus ex machina* introduces a legal principle:<sup>31</sup> since international treaties are the product of international law and part of its respective legal order,<sup>32</sup> they should always be interpreted in a way that, by taking into consideration the broader normative environment, will avoid fragmenting it.<sup>33</sup> Gradually, legal scholarship came to second the idea of systemic integration. Hence, not only did legal scholarship recognize systemic integration as a well-established principle of international law, but it also generously offered the principle the status of a constitutional norm!<sup>34</sup>

The rationale underlying this approach is self-evident. The term “fragmentation” bears a clear negative connotation: it is considered to be a problem, a malfunction of the system, a symptom of disorder, a threat. Therefore, maintaining the unity of the international legal order—a *conditio sine qua non* for this order to operate effectively—becomes an

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*Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, ¶ 27, U.N. Doc. A/CN.4/L.676 (July 29, 2005).

31. See ILC, *Final Report on Fragmentation of International Law*, *supra* note 28, ¶ 415 (“[T]he principle of systemic integration goes further than merely restat[ing] the applicability of general international law in the operation of particular treaties. It points to a need to take into account the normative environment more widely.”).

32. ILC, *Report of the Study Group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Conclusions of the Work of the Study Group*, U.N. Doc. A/CN.4/L.702 (July 18, 2006). The ILC points out that Article 31(3)(c) “gives expression to the objective of ‘systemic integration’ according to which, whatever their subject matter, treaties are a creation of the international legal system and their operation is predicated upon that fact.” *Id.* ¶ 14(17).

33. See ILC, *Final Report on Fragmentation of International Law*, *supra* note 28, ¶ 410 (explaining that special instruments are to be applied “with minimal disturbance to the operation of the legal system”).

34. See Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 INT’L & COMP. L.Q. 279, 280 (2005). According to McLachlan’s view, systemic integration reflects “a more general principle of treaty interpretation . . . [that] operates . . . as an inarticulated major premise in the construction of treaties . . . [and] flows so inevitably from the nature of a treaty as an agreement ‘governed by international law’” that it has attained within the international legal system the “status of a constitutional norm.” *Id.* at 280 (quoting VCLT, *supra* note 6, art. 2(1)(a); cf. Karel Wellens, *Quelques réflexions d’introduction*, in L’INFLUENCE DES SOURCES, *supra* note 13, at 1, 20–21 (providing a more cautious approach that raises questions regarding whether systemic integration has indeed emerged as a principle of international law and whether this would suggest that systemic integration—in keeping with the aim of maintaining the unity of international law—should prevail over other means of interpretation). *Contra* Benedetto Conforti, *Unité et fragmentation du droit international: “Glissez, mortels, n’appuyez pas!”*, 111 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 5, 16 (2007) (arguing that the ILC’s conception of the special role of systemic integration does not find a confirmation in international reality and defending courts’ discretion to freely choose among the means of interpretation they consider most appropriate); see also ALEXANDER ORAKHELASHVILI, *THE INTERPRETATION OF ACTS AND RULES IN PUBLIC INTERNATIONAL LAW* 367 (2008) (highlighting the insufficiencies of the systemic integration method of interpretation, since “integration relates to a result, while interpretation methods definitionally relate to methods and means”).

objective *per se*, a common necessity for the whole international community. According to the logic underlying systemic integration, the aim and purpose pursued by a given norm of international law can only be realized as long as and to the extent that its effect will not fragment international law. Granting Article 31(3)(c) *de facto* primacy above other methods of interpretation thus seeks to guarantee that fragmentation will be avoided.<sup>35</sup> Moreover, attribution of a particular priority to the objectives pursued by systemic integration implies that the teleology pursued by another norm of international law can achieve its *effet utile* only to the extent that it does not impede the unity of international law. The upgrading of Article 31(3)(c) from one simple interpretative method among others to a principle of international law or a constitutional norm can thus only be explained as a reaction—the (self-)defense of a system threatened to explode into compartmentalized pieces.

However, in spite of its openly pro-international legal order orientation, this approach reveals profound self-awareness. Rather than using the contiguous term of systematic interpretation,<sup>36</sup> which is a well-known technique within municipal law, the ILC christens this tool of interpretation with the name of “systemic integration,” which has two implications. In addition to implying that special international law is, by means of interpretation, harmonically integrated within the general system, it also suggests that, thanks to a process of harmonious integration, the system of international law is becoming more complete, firm, compact, and uniform—or, in a word, integrated. The decentralized nature of the international legal order, its imperfect institutionalization, the absence of objectivity, and the dominance of sovereign bilateralism all render it a system which is immature and frequently ineffective. Thus, the teleology of Article 31(3)(c) cannot be limited to the simple preservation of the system’s integrity; it follows that the article should also make a positive contribution towards its further integration. The term “systemic integration” is thus not static—it calls for evolution.

That said, that Article 31(3)(c) of the VCLT was originally intended<sup>37</sup> to serve as a means by which to foster the inter-temporal rejuvenation of

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35. *Contra* Isabelle Van Damme, *Some Observations About the ILC Study Group Report on the Fragmentation of International Law: WTO Treaty Interpretation Against the Background of Other International Law*, 2006 FINNISH Y.B. INT’L L. 21, 27 (arguing that the aim of ILC was to clarify rather than to suggest priority in the application of Article 31(3)(c)).

36. *See* DICTIONNAIRE DE DROIT INTERNATIONAL PUBLIC 607 (Jean Salmon ed., 2001) (describing systemic interpretation in international law as a method of interpretation, making reference to the whole institutional and normative organization of the international community).

37. For a thorough analytical overview of the drafting history of Article 31(3)(c) within the ILC and beyond, see Panos Merkouris, *Debating the Ouroboros of International Law: The Drafting History of Article 31(3)(c)*, 9 INT’L COMMUNITY L. REV. 1 (2007).

treaty provisions comes as no surprise.<sup>38</sup> As its *travaux préparatoires*<sup>39</sup> show, the issue was debated in great depth and the initial version of the document—which provided that treaties should be interpreted in the light of the law in force at the time of their drafting—was abandoned. By leaving out the Fitzmaurician principle of contemporaneity, the final version of the VCLT managed to omit the temporal factor. What was finally decided was “to transfer this element of interpretation to paragraph 3 [of Article 31] as being an element which is extrinsic both to the text and to the ‘context.’”<sup>40</sup> That is, although the reference in subparagraph (3)(c) to “any relevant rules of international law” is less explicit, it seems wide enough to embrace those norms that were not applicable at the time of conclusion of a treaty.<sup>41</sup> Subsequent developments that were not initially envisaged by the parties<sup>42</sup> can thus, by way of Article 31(3)(c), be integrated into a judge’s rationale and therefore become applicable at the time of interpretation.<sup>43</sup>

Yet, the idea of interpreting a special instrument in light of the evolution taking place within the broader international legal order is reminiscent of another interpretative method. Inter-temporality is inseparably linked to the dynamic or evolutive (the two terms treated in this Article as synonymous) method of interpretation, which calls for the interpretation of a norm in accordance with any evolution that occurred

38. See RICHARD K. GARDINER, *TREATY INTERPRETATION* 251–56 (2008).

39. See THE VIENNA CONVENTION ON THE LAW OF TREATIES: TRAVAUX PRÉPARATOIRES 244–49 (Dietrich Rauschning ed., 1978) [hereinafter VCLT TRAVAUX PRÉPARATOIRES]; see also Jan Klabbbers, *Reluctant Grundnormen: Articles 31(3)(c) and 42 of the Vienna Convention on the Law of Treaties and the Fragmentation of International Law*, in TIME, HISTORY AND INTERNATIONAL LAW 141, 143–48 (58 Developments in International Law, Matthew Craven et al. eds., 2007) (providing a very comprehensive review of the drafting history of Article 31(3)(c)).

40. VCLT TRAVAUX PRÉPARATOIRES, *supra* note 39, at 254.

41. Francis G. Jacobs, *Varieties of Approach to Treaty Interpretation: With Special Reference to the Draft Convention on the Law of Treaties Before the Vienna Diplomatic Conference*, 18 INT’L & COMP. L.Q. 318, 330 (1969).

42. See IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 140 (2d ed. 1973) (insisting that it “must always be on condition that such an evolutionary interpretation does not conflict with the intentions and expectations of the parties as they may have been expressed during the negotiations preceding the conclusion of the treaty”). The accent is placed clearly onto the *volonté* of the contracting parties. See *id.* But see V. Crnic-Grotic, *Object and Purpose of Treaties in the Vienna Convention on the Law of Treaties*, 1997 ASIAN Y.B. INT’L L. 141, 165 (explaining that the evolutive interpretation is understood as a method “satisfying new needs which were not foreseen originally by the parties” and falls under the broader teleological technique of interpretation) (citation omitted).

43. See SINCLAIR, *supra* note 42, at 139 (arguing that “a treaty may retain in force for many years, and . . . international law may evolve and develop during the period when the treaty is in force” and that “[t]here is some evidence that the evolution and development of international law may exercise a decisive influence on the meaning to be given to expressions incorporated in a treaty, particularly if these expressions themselves denote relative or evolving notions”).

within the court's respective legal system since the enactment of the norm.<sup>44</sup>

Thus, one could argue that Article 31(3)(c) is much more than an apparatus enabling the interpreter of a special *instrumentum* of international law to read its norms in light of third (that is to say, extraneous) relevant sources—stemming from both general<sup>45</sup> and inter-subjective or special<sup>46</sup> international law. While definitely offering this option, Article 31(3)(c) does so in a broader, inter-temporal frame. Hence, the interpretation of a treaty “cannot remain unaffected by the subsequent development of law” and “has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.”<sup>47</sup> Again, a treaty “is not static, and is open to adapt to emerging norms of international law.”<sup>48</sup>

Nonetheless, to be fair to the ILC, one must recognize that its report, which apparently calls a well-known tool (dynamic or evolutive method of interpretation) by a new name (systemic integration technique), it makes special reference to the inter-temporal dimension of Article 31(3)(c).<sup>49</sup> However, the ILC has chosen to examine the inter-temporality

44. See the similar definition provided by the *DICTIONNAIRE DE DROIT INTERNATIONAL PUBLIC*, *supra* note 36, at 605. As Jean Marc Sorel explains, most of the time, the other interpretative techniques are proven to be sufficient and, therefore, reference to general international law by the means of Article 31(3)(c) becomes pertinent mostly for the purposes of dynamic interpretation, which aims to take into account the evolution of international law in general. Sorel, *supra* note 8, at 1323.

45. See *Oil Platforms (Iran v. U.S.)*, 2003 I.C.J. 161, 182 (Nov. 6) (refusing to accept, after making explicit reference to Article 31(3)(c), that the bilateral treaty between two adverse parties “was intended to operate wholly independently of the relevant rules of international law on the use of force” and holding that “[t]he application of the relevant rules of international law relating to this question . . . forms an integral part of the task of interpretation entrusted to the Court”).

46. See *Certain Questions of Mutual Assistance in Criminal Matters (Djib. v. Fr.)*, 2008 I.C.J. 37 (June 4), available at <http://www.icj-cij.org/docket/files/136/14550.pdf> (last visited Mar. 26, 2010). The court resorted to Article 31(3)(c) in order to refer to an old bilateral treaty of friendship between Djibouti and France. *Id.* ¶¶ 112–14. The convention over which the dispute between these two states arose was interpreted in the light of that treaty of friendship. *Id.*

47. *Legal Consequences for States of Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. 16, 32–33 (June 21).

48. *Gabcíkovo-Nagymaros Project (Hung. v. Slov.)* 1997 I.C.J. 7, 68 (Sept. 25). Nevertheless, it is important to mention that the court applied the dynamic method of interpretation only after having established that doing so was within the intentions of the parties to the treaty—that is, “by inserting . . . evolving provisions in the Treaty, the parties recognized the potential necessity to adapt the Project.” *Id.* at 67.

49. ILC, *Report of the International Law Commission*, ¶ 251(4)(22), U.N. Doc. A/61/10 (Oct. 1, 2006) [hereinafter *2006 ILC Report*] (“International law is a dynamic legal system. A treaty may convey whether in applying Article 31(3)(c) the interpreter should refer only to rules of international law in force at the time of the conclusion of the treaty or may also take into account subsequent changes in the law. Moreover, the meaning of a treaty provision may



issue as a “special question”<sup>50</sup> of systemic integration. This choice would appear to reveal the ILC’s understanding about the relationship between the two methods of interpretation: it seems to conceive of the dynamism of the international system in evolving towards deeper integration as an exclusively unidirectional process. Special regimes are meant to be interpreted in light of international law so that their effects are in harmony with the system of the latter. Otherwise they risk contributing to fragmentation and thus impede further integration. According to this approach, because of the risk of fragmentation, a stop should be put to any forces of evolution stemming from the special regimes or from normative systems other than the international one that might possibly affect these special regimes. By the same token, the evolution that derives from the special regimes’ practice has to be deprived of any potential to affect the already crystallized norms of general international law. For Article 31(3)(c) to successfully promote systemic integration during diachronic evolution of the normative environment without allowing fragmentation, the systemic center must be either robust enough to remain intact despite changes taking place within special regimes (which would mean that fragmentation was a non-issue) or else static and therefore, by definition, unaffected by such changes. As we all know very well, this is not the case of international law.

If we accept that this last point is valid, we must also accept that evolutive interpretation may move in the other direction: that is, rather than going hand-in-hand with systemic integration, the evolutive/dynamic technique may also be proven (if evolution originates “inland” from the specialized regimes) to cause (temporary) fragmentation. If this is right, then these two techniques of interpretation may theoretically both diverge and converge. Yet it is only in the scenario of convergence that Article 31(3)(c) indeed operates, as the title of this chapter suggests, as a *servitore di due padroni*. This is a presumption that should be tested in the case law of the ECtHR. However, before engaging in this intellectual exercise, it is important to offer an overview of the specialty of the ECHR and of the margin of discretion recognized to its interpreters either to place emphasis on the *sui generis* socio-normative nature of its teleology or to proceed with a less constitutional reading and, thereby, to give priority to the (highly voluntarist) economy of the international legal system within which the Convention is situated.

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also be affected by subsequent developments, especially where there are subsequent developments in customary law and general principles of law.”).

50. ILC, *Final Report on Fragmentation of International Law*, *supra* note 28, ¶¶ 461, 475–78.

## II. INTERPRETING THE ECHR: PLURALISM WITHIN A DUALIST DÉCOR

### A. *The Dualist Confines of Pluralism in the Means of Interpretation*

As has been ingeniously suggested, treaty interpretation appeals to the spirit of finesse more than to the spirit of geometry.<sup>51</sup> The contrast between these two concepts is strong and the message for the judge quite clear. Selectivity in methods of interpretation, although forbidden by the strict rules of geometry, is acceptable when necessary to a particular outcome. All the same, even when a judge aspires to interpret subtly, she does not have *carte blanche* in doing so. Much as deviating from geometric rules may result in mistaken conclusions, dexterous approaches to interpreting legal documents may be over-fussy, if not downright clumsy; the legitimacy of the interpretation can ultimately be assessed only by the final result—that is, whether this result is just and reasonable.

If it is accepted that a judge possesses a right (competence) to make judicial choices, she “cannot be regarded as having a purely neutral role as discoverer and enforcer of the law but as being an active participant.”<sup>52</sup> This notion of choice arms the judge with considerable liberty of action both to self-restrain her powers, as long as this does not end up in a denial of justice, and to move beyond the letter of the law, as long as this does not result in judicial activism in the sense of a metamorphosis of the norm. All the same, the concepts of both denial of justice and activism are substantially vague and broad, leading inevitably to subjective opinions on whether judicial interpretation respects the limits set by these two extremes. The dividing line between legislating and adjudicating is always fine. Without entering into a discussion of the definition of these concepts, the thesis promoted by this Article is that, within the fragile boundaries of judicial competence, each and every judge is free to select the reasoning that seems to her most appropriate and persuasive in order to support the outcome that both the law and her conscience suggest in a given moment, with reference to the particular social environment that gave birth to the conflict. Consequently, judicial discretion includes both the final outcome of the decision as well as the means for its support. It also implies the existence of pluralism among interpretative tools, not all of which necessarily produce identical solutions. Hence, a judge demonstrates selectiveness when she excludes those tools

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51. PATRICK DAILLIER & ALAIN PELLET, *DROIT INTERNATIONAL PUBLIC* 264 (7th ed. 2002).

52. Paul Mahoney, *Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin*, 11 HUM. RTS. L.J. 57, 60 (1990).

that do not support the outcome that she considers just or that do not promote the values, objectives, or necessities to which she gives priority.

Focusing then on the example of the ECtHR, the Strasbourg Court often integrates in its reasoning “different arguments . . . read in [such] a way that they are channeled toward a common interpretation.”<sup>53</sup> These diverse arguments, corresponding to respective interpretative techniques that have been selected among other available ones, are employed in a cumulative and converging way, so that the court’s judgment presents the fullest possible justification. In order for the ECtHR to implement this kind of pluralistic interpretative operation, it makes use of a toolbox containing a set of both the well-known methods (the classic international law interpretative tools) and certain others specific to its regime.<sup>54</sup>

The point of departure for judicial interpretation can be none other than the law, that is, the text of the ECHR. A textual analysis focuses on the wording of the Convention and aims at investigating the literal meaning of its language.<sup>55</sup> Self-evidently, this technique is closely related to a second technique, which focuses on the will of contracting parties.<sup>56</sup> The ECHR *negotium*, as reflected in the text of the Convention, is the product of the *volonté* of its signatory parties. Since its normativity stems from state will, voluntarist positivism requires that the Convention neither be given an effect against this *volonté*, nor produce results that were originally meant to be excluded. Thus reference to its *travaux préparatoires* may prove particularly helpful in shedding light on the original intentions of the parties.<sup>57</sup>

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53. Mark Toufayan, “Human Rights,” “Speciality” in *Interpretation and the Anxieties of Violence* 34 (2005) (on file with author); see also Mark Toufayan, *Human Rights Treaty Interpretation: A Postmodern Account of Its Claim to “Specialty”*, at iii (Ctr. Hum. Rts. & Global Justice, Working Paper No. 2, 2005), available at <http://www.chrgj.org/publications/docs/wp/0502%20Toufayan.pdf> (last visited Mar. 26, 2010) [hereinafter Toufayan, *Human Rights Treaty Interpretation*] (providing a shorter version of Toufayan’s study).

54. See the classification of the methods of interpretation of the ECtHR proposed by Olivier De Schutter, *L’Interprétation de la Convention Européenne des Droits de L’Homme: Un Essai en Demolition*, 70 REVUE DE DROIT INTERNATIONAL DE SCIENCES DIPLOMATIQUES ET POLITIQUES 83 (1992).

55. See, for example, the argument that the court made concerning the question of euthanasia in *Pretty v. United Kingdom*, 2002–III Eur. Ct. H.R. 155, 186 (holding that the right to life “cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die”).

56. See, e.g., *Sunday Times v. United Kingdom*, 30 Eur. Ct. H.R. (ser. A) at 30 (1979) (holding that “[i]t would clearly be contrary to the intention of the drafters of the Convention to hold that a restriction imposed by virtue of the common law is not ‘prescribed by law’ on the sole ground that it is not enunciated in legislation”).

57. See, e.g., *James v. United Kingdom*, 98 Eur. Ct. H.R. (ser. A) 14, 39–40 (1986) (“Confronted with a text whose interpretation has given rise to such disagreement, the Court considers it proper to have recourse to the *travaux préparatoires* as a supplementary means of interpretation.”).

Moreover, nothing prevents the court from “delegating” its authority as ultimate interpreter of the Convention to national courts, allowing them to exercise a margin of appreciation<sup>58</sup> to define a term of the Convention at the domestic level, in accordance with the premises, legal traditions, sensitivities, and particular values dominant within the respective national legal orders. In so doing, there is a strong presumption that a national judge is not only better situated to translate, through case law, the prevailing societal understanding over a given question of human rights protection at any given moment, but also that, since her state’s courts form part of a particular democratic society and its legal order, she is better positioned to construe the current majoritarian will of its executive.

Against the voluntarist reading of the Convention, one can juxtapose the constitutional, or objectivist, interpretation and the plethora of means that an ECtHR judge possesses that allows the ECHR to effectuate its humanistic and integrational objectives. If the advantages of the margin of appreciation method are flexibility, pluralism, and respect for the particularities of different societies, the aim of the diametrically opposite technique—that is, autonomous interpretation<sup>59</sup>—is to ensure that cultural diversity and polyphony will not turn the European public order into Babel. Within the European sub-system, the tempo is set by the judges of Strasbourg. Thus, it is for these latter to choose when a term of the Convention should be given one single pan-European definition, irrespective of the content that it was given by domestic courts. For the ECHR to successfully establish common standards of human rights protection, consolidate its public order, and speak with one single voice to all the domestic orders of its signatory parties, its lexicon must be unified, common, and distinctive. Besides, the ECHR regime itself corresponds to an integrated and highly centralized system and, as such, it can only accommodate polyphony to the extent that this does not threaten to fragment it.

Going beyond the objective of uniformity, one interesting argument in favor of an ECtHR as “ultimate interpreter” of the ECHR is that, like all others, European society is subject to evolution. Although in doing so

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58. See, e.g., *Rees v. United Kingdom*, 106 Eur. Ct. H.R. (ser. A) at 30 (1986). This case concerned whether the respondent state had an obligation to adopt positive measures conferring on the applicant, a transsexual, legal status corresponding to his new sexual identity. Recognizing that, in the absence of consensus on the issue, states enjoy a “wide margin of appreciation” to regulate this type of question at the domestic level, the ECtHR abstained from drawing a common standard at pan-European level and rather granted states the competence to regulate and/or adjudicate the issue at the domestic level. *Id.*

59. See *Öztürk v. Germany*, 73 Eur. Ct. H.R. (ser. A) at 18 (1984); *Engel v. Netherlands*, 22 Eur. Ct. H.R. (ser. A) at 34 (1976).

it evidently risks diluting the original will of states,<sup>60</sup> the court often recalls that the Convention is a “living instrument which must be interpreted in the light of present-day conditions.”<sup>61</sup> Given the dual nature of the ECHR as a classic international treaty and a special instrument for the establishment and further integration of a regional public order, these present-day conditions may well take into account the socio-normative evolution occurring within both<sup>62</sup> the international legal order (through Article 31(3)(c) VCLT)<sup>63</sup> and the domestic orders of the member states.<sup>64</sup>

The juxtaposition of the various available methods of interpretation could continue to follow the same antithetic schema and to evidence the fact that the ECtHR is perfectly able both to maintain the original will of the contracting parties<sup>65</sup> and to diverge from it. The reason for divergence would have remained unclear had the Strasbourg Court not highlighted the special aim and purpose of the ECHR and suggested that it was its drafters’ intention to endow it with such a *telos*.<sup>66</sup> The character of the Convention resembles that of a “constitutional instrument of European public order.”<sup>67</sup> Due, finally, to its special nature,<sup>68</sup> the ECHR *telos* re-

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60. Cf. Frédéric Sudre, *À Propos du Dynamisme Interprétatif de la Cour Européenne des Droits de l’Homme*, 28 LA SEMAINE JURIDIQUE ÉDITION GÉNÉRALE 1365 (July 11, 2001) (arguing that the evolutive method of interpretation depends in reality on states’ consent). Thus, according to Sudre, the truly “dynamic” reading of the ECHR relies primarily on methods of interpretation other than the “consensual-evolutive” one.

61. *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. A) at 26 (1995) (decision on the preliminary objections).

62. RAMONA TOMA, *LA RÉALITÉ JUDICIAIRE DE LA COUR EUROPÉENNE DES DROITS DE L’HOMME: ACTIVISME ET RETENUE JUDICIAIRES* 56–61 (2003).

63. See the case law presented in Part III.A.1, *infra*.

64. See, e.g., *Tyrer v. United Kingdom*, 26 Eur. Ct. H.R. at 15–16 (1978) (judgment on the merits) (“In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of member States . . . in this field.”).

65. See George Letsas, *A THEORY OF INTERPRETATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 58–72 (2007) (objecting to the voluntarist reading of the Convention, which the author defines as “intentionalism”).

66. Hence, since “[i]t is clear from the Preamble to the Convention that the High Contracting Parties in concluding the Convention intended . . . to take steps for the collective enforcement of the rights and . . . that the purpose . . . was ‘to establish a common public order of the free democracies of Europe,’” its teleology cannot be other than the effective protection of the rights it enumerates. Chrysostomos, *Papachrysostomou & Loizidou v. Turkey*, App. Nos. 15299/89, 15300/89, 15318/89, 68 Eur. Comm’n H.R. Dec. & Rep. 216, 241–42, ¶ 20 (1991) (decision as to the admissibility) (quoting *Austria v. Italy*, 1961 Y.B. Eur. Conv. H.R. 116, 138 (Eur. Comm’n H.R.)).

67. *Chrysostomos, Papachrysostomou, & Loizidou*, 68 Eur. Comm’n H.R. Dec. & Rep. at 242; *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. A) at 27 (1995) decision on the preliminary objections).

68. The ECtHR started building the idea of an international *instrumentum* of special character in its very early judgments. See, e.g., *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) 5, 90 (1978) (“Unlike international treaties of the classical kind, the Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and

quires that it guarantee “rights that are practical and effective”<sup>69</sup> (that is, it must fulfill the principle of effectiveness, or the *effet utile*).

### B. *The Dualist Confines of the Special Nature of the ECHR*

The ECHR’s specialty, as argued in the introduction of this Article, is multi-level. In the first instance, the Convention is special in the sense that its norms are deprived of general effect. Being signed and ratified by a closed number of states, its normativity is relative, that is, it is inter-subjective. However, it is on the second level of specialty that the ECtHR relies in order to nourish its human rights teleology and, in the name of the effectiveness of rights protection, often ranks other conflicting objectives lower, including sometimes the objective of systemic integration. The ECHR is a special international treaty in that it protects the dignity-stemming rights of the human being. It defends interests which are common to its signatory parties and not exclusive to each of them separately. In support of the idea of a special *instrumentum* that is at the service of certain common values ranked of greater importance to a particular social group, general international law offers to the substantive norms created by such a treaty an equally special, distinct, if not virtually hierarchically<sup>70</sup> superior normative status.

The human rights provisions of the ECHR introduce objective obligations which are owed *erga omnes partes* and, in so doing, the provisions establish a community of interests, the safeguarding of which falls under the common responsibility of all states parties. With its 2006 final Report on Fragmentation of International Law, the ILC classified the categories of *erga omnes* and *erga omnes partes* norms next to that of *jus cogens* and examined all three under the general heading of “relations of importance.”<sup>71</sup> However, the conclusion it reached was that

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above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a ‘collective enforcement.’”)

69. *E.g.*, *S. v. Switzerland*, 220 Eur. Ct. H.R. (ser. A) at 16 (1991). The origins of the principle of effectiveness can be found in *Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A) (1979). Ever since, the principle has served as the basis for building a *pro homine* case law on a number of issues, including the positive or quasi-horizontal effect of the ECHR.

70. One cannot but refer to the famous paper by Prosper Weil criticizing the danger of the “erosion” of “classic” international law by the “new” trends of, *inter alia*, *jus cogens* and *erga omnes*. Prosper Weil, *Towards Relative Normativity in International Law*, 77 AM. J. INT’L L. 413 (1983). Among several other works on the hierarchy of norms, see Juan Antonio Carrillo Salcedo, *Reflections on the Existence of a Hierarchy in International Law*, 8 EUR. J. INT’L L. 583 (1997); J.H.H. Weiler & Andreas L. Paulus, *The Structure of Change in International Law or Is There a Hierarchy of Norms in International Law?*, 8 EUR. J. INT’L L. 545 (1997).

71. ILC, *Final Report on Fragmentation of International Law*, *supra* note 28, ¶¶ 324–409.

[o]bligations *erga omnes* are different from Article 103 of the United Nations Charter and *jus cogens*. Whereas the latter are distinguished by their normative power—their ability to override a conflicting norm—obligations *erga omnes* designate the *scope of application* of the relevant law, and the procedural consequences that follow from this. . . . The *erga omnes* nature of an obligation . . . indicates no clear superiority of that obligation over other obligations. Although in practice norms recognized as having an *erga omnes* validity set up undoubtedly important obligations, this importance does not translate into a hierarchical superiority similar to that of Article 103 and *jus cogens*.<sup>72</sup>

Thus, the ILC considered it important to emphasize

the clear difference that exists between *jus cogens* norms and obligations as *erga omnes*. The former have to do with the normative “weight” of a norm, the latter with its procedural “scope.” While a *jus cogens* norm has necessarily an *erga omnes* scope, not all *erga omnes* obligations have weight as *jus cogens*.<sup>73</sup>

However, the counter-argument against such a conservative approach highlights that the principal procedural consequences of the *erga omnes* and, *mutatis mutandis*, *erga omnes partes* norms,<sup>74</sup> described by the ILC as the procedural *scope of application*, are not a “scope”, that is to say an objective *per se*; after all, that procedural effect is not born *ex nihilo* but rather is a rational, self-operative consequence stemming from the fact that these norms—by definition—incorporate values ranked of high importance by the international community. The reason indeed why these obligations are owed *erga omnes* (and thereby require collective enforcement) is because they incorporate values bearing substantial moral

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72. *Id.* ¶ 380.

73. *Id.* ¶ 408.

74. See ILC, *Draft Resolution: Responsibility of States for Internationally Wrongful Acts*, art. 48(1), U.N. Doc. A/C.6/56/L.20 (Nov. 12, 2001) [hereinafter *ILC Norms on State Responsibility*]. The Resolution provides:

Invocation of responsibility by a State other than an injured State:

1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if: (a) The obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or (b) the obligation breached is owed to the international community as a whole.

*Id.*

weight for the community as a whole.<sup>75</sup> Recognizing this, this Article argues that the material scope—and not the procedural consequences—of the value-stemming objectives promoted by the *erga omnes* norms call for the recognition of their normative superiority *vis-à-vis* the classic bilateral or bilateralizable norms of international law.

However, the effect of the primacy described here does not mirror that of *jus cogens*; *erga omnes* norms are neither absolute nor non-derogable. Moreover, they cannot generate the nullifying effect of peremptory norms. The normative weight of *erga omnes* obligations simply implies that priority should be given to their fulfillment. However, if a non-*erga omnes* norm conflicted with an *erga omnes* norm, the normative force of each would remain intact *in abstracto*, but the first would be allowed to produce its results only to the extent that it did not disproportionately impede the effect of the *erga omnes* obligation. Unlike *jus cogens*, *erga omnes* norms are susceptible to exceptions and limitations;<sup>76</sup> however, these exceptions and limitations are allowed on the precondition that they respect the exigencies of proportionality. The role of this precondition is central to priority setting, to the balancing of conflicting objectives, and to measuring the extent to which the effect of a given *erga omnes* norm may be limited. The legality of the limitations is to be decided *ad hoc*, after taking into account the context and the particular circumstances of each case.

Finally, even if one wanted to follow the ILC's procedural approach and neglect the material dimension of the *erga omnes* norms, it would be difficult to imagine how two states' (bilateral) law-making powers could supersede obligations they owe *vis-à-vis* a much broader circle of subjects—unless of course their bilateral (or bilateralizable) results were not *per se* incompatible with or disproportionate to their *erga omnes* obligations.

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75. See Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT'L L. 318 (2006) (arguing that "obligations *erga omnes* have specific and broad procedural consequences *because of* the substantive importance of the norms they enunciate"); see also Questions Relating to Obligation to Prosecute or Extradite (Belg. v. Sen.) (Order of May 28, 2009) (Trindade, J., dissenting), ¶ 71, available at <http://www.icj-cij.org/docket/files/144/15154.pdf> (last visited Mar. 26, 2010) (emphasizing the values protected by obligations *erga omnes* as the source of their special status); MAURIZIO RAGAZZI, THE CONCEPT OF INTERNATIONAL OBLIGATIONS ERGA OMNES 202–03 (1997). *Contra* Alain Pellet, *Conclusions*, in THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER 418 (Christian Tomuschat & Jean-Marc Thouvenin eds., 2006); IAN D. SEIDERMAN, HIERARCHY IN INTERNATIONAL LAW: THE HUMAN RIGHTS DIMENSION 125 (2001).

76. See Pieter van Dijk, *The Status of International Treaties on Human Rights: The Hierarchy of Rules of International Law*, Venice Commission, in THE STATUS OF INTERNATIONAL TREATIES ON HUMAN RIGHTS 222–24 (2006) (contending that both *erga omnes* and *jus cogens* have a higher rank than other rules of international law and, unlike *jus cogens*, obligations *erga omnes* are not absolute, but contain an "absolute core").



The ECHR is, therefore, as “special” as any other human rights treaty that establishes obligations *erga omnes partes* that reflect values common to all of its contracting parties. The substantive international obligations deriving from it are owed *vis-à-vis* the whole community of parties and the safeguarding of their material content falls under common responsibility. Due to its *erga omnes partes* nature the ECHR recognizes the legitimate interest of each and every state party in reacting to violations, regardless of whether it is directly affected by the breach.<sup>77</sup> Intentionally designed as a non-synallagmatic agreement, the ECHR squarely excludes reciprocity. Last but not least, as a consequence of these special characteristics and, mainly, due to the material humanistic scope of its provisions, the Convention’s substantive provisions require that a certain (non-absolute) priority be given to their fulfillment, as against other conflicting bilateral or bilateralizable obligations.

The ECHR’s specialty is not, however, limited only to the normative quality of its substantive provisions. At the third and last level, its special normative effects are expected to be produced within an equally special socio-political context. If general international law is the matrix which gave birth to the ECHR, the European continent is the arena in which it produces its effect and the idea of European integration is its *raison d’être*. The geographical, economic, social, and political confines of Europe—a social unit marked by the bitter experiences of its past and inspired by a common understanding of certain values—delimit not only its normative, but primarily its practical and effective limits. Within this space, the ECHR functions as an instrument of constitutional weight, designed for the anthropocentric integration of a rather homogeneous regional group, which despite its inherent diversity is far more integrated and compact than the broader universal system.

Certainly, pluralism in its methods of interpretation has neither excluded nor precluded “the emergence of a specific ‘human rights ethos’ or even a ‘European human rights tradition’”<sup>78</sup> elevated to a European public order. Equally, however, it cannot be argued that pluralism alone guarantees balance between the “musts” of a document reflecting the logic of a human rights regional quasi-constitution and the “oughts” of a multilateral treaty forming part and parcel of international law. At the same time, neither does pluralism prohibit such a balance. Thus, no matter how rich the interpretative arsenal of an ECtHR judge is, she is

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77. “Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the protocols thereto by another High Contracting Party.” ECHR, *supra* note 3, art. 33; see ILC *Norms on State Responsibility*, *supra* note 74, art. 48(1)(a).

78. Toufayan, *Human Rights Treaty Interpretation*, *supra* note 53, at 21.

forced to adapt its use to the logic, conditions, and exigencies of the dualist nature of the ECHR, which can be schematized by the following three antithetic ideas: (1) subjective will of the states versus objective *pro homine telos*; (2) integration of the Convention into the broader international system versus the constitutional specialty of its regional system; and (3) integration of the broader international system versus the integration of the European public order.

Having dealt with this, the way is now open to examine how Article 31(3)(c) of the VCLT takes effect within the confines of this contradictory, multidimensional, dualistic décor.

### III. THE USE OF ARTICLE 31(3)(c) IN ECTHR CASE LAW

Having concluded the theoretical part of the study, the section that follows is devoted to an analysis of the practice of the ECtHR, with the aim of testing the validity of the presumptions that have been outlined so far. It goes without saying that although, in principle, the court proceeds *proprio motu* in controlling the suitability of the systemic integration method of interpretation (or, as this Article argues, selects it<sup>79</sup> among the other interpretive techniques available), there is nothing to prevent the

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79. See, e.g., *Andrejeva v. Latvia*, App. No. 55707/00 (Eur. Ct. H.R. Feb. 18, 2009) (Ziemele, partly dissenting) ¶¶ 15–17. In this interesting partial dissent, Judge Ziemele accuses the court of applying the Convention “in isolation from international law.” *Id.* The applicant, no longer a citizen of any state, alleged that the respondent state had discriminated against her in refusing to grant her a pension for her employment in the former Soviet Union prior to 1991 on the ground that she did not have Latvian citizenship. According to Judge Ziemele, the court should have first determined—through systemic integration—whether, in terms of international law, the respondent state succeeded or not to the obligations of the Soviet Union in the field of social rights. *Id.* ¶¶ 17–21. Apparently, for Judge Ziemele, the answer to this question constituted a preliminary condition for the Convention to apply. Nevertheless, although admittedly not as explicitly as could be desirable, the court made a very strong point concerning its refusal to resort to the norms of international law over state succession. According to its argument, even assuming that the respondent state did not succeed the former Soviet Union as to this specific obligation, “the conclusion that has to be drawn in this case would be unaffected: where a State decides of its own accord to pay pensions to individuals in respect of periods of employment outside its territory, thereby creating a sufficiently clear legal basis in its domestic law, the presumed entitlement to such benefits falls within the scope of Article 1 of Protocol No. 1.” *Id.* ¶ 78 (judgment). Hence, while international law did not require the respondent state to grant a pension to the applicant for her work under the Soviet regime, once it had decided unilaterally and voluntarily to provide pension to individuals under its jurisdiction, it had to do so non-discriminatorily. *Id.* ¶ 90. The legal basis for the applicant’s entitlement finds its source in domestic law. Yet, interpreted in the light of the European public order, this entitlement acquires the effect of a “quasi-unilateral act.”

parties to the conflict from calling for an interpretation of the Convention in the light of the norms of international law relevant to their case.<sup>80</sup>

This Article argues that this case law can be classified by the role that ECtHR judges have given to Article 31(3)(c) with regard to the standing of ECHR norms *vis-à-vis* the broader system into which they are expected to harmonically integrate. The suggested taxonomy requires assessing the use of Article 31(3)(c) at two levels: (A) its effect on *normative* aspects of systemic integration, and (B) this effect on *institutional* aspects of systemic integration.

Within this first categorization, further analysis is necessary: the Article argues in Part III.A that there are three distinct scenarios in which the ECtHR might use Article 31(3)(c), including when:

- (1) the norms of the ECHR are *complementary* to the extraneous relevant norms of international law;
- (2) the Conventions' norms *conflict* with other norms of international law; and
- (3) the norms of international law are *ratione materiae* irrelevant to the ECHR subject matter, and are such that the ECtHR must resort to in order to answer a preliminary question that is necessary for its regime to produce effects.

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80. For examples of cases in which the parties invoked Article 31(3)(c) on their own initiative, see, *inter alia* Markovic v. Italy, App. No. 1398/03, 44 Eur. H.R. Rep. 52, 1045, 1078 (2007). In this case, the court had to decide whether there had been a violation of the right of access to justice (Article 6 of the ECHR). The applicants, victims of the use of force by NATO against the former Federal Republic of Yugoslavia, alleged that they had suffered a denial of justice when Italy refused to examine on the merits Applicant's tort action for damages under international and domestic law. *Id.* ¶ 100. In order for the ECtHR to decide whether the respondent state violated the right of access to justice, it first had to decide whether the international law norms on which the applicants founded their claim for reparation supported such an action. *Id.* ¶¶ 100–02, 108–09. The validation of the domestic courts' practice came only after the court proceeded with its own interpretation of these international norms. *Id.* ¶ 109. This case would be classified in the third of the categories discussed later in this Article (those that resort to international law for preliminary questions of applicability of the ECHR). See also Carlson v. Switzerland, App. No. 49492/06 (Eur. Ct. H.R. Nov. 6, 2008) (judgment on the merits). This case concerned child abduction. While alleging a violation of his right to family life under Article 8 of the ECHR, the applicant called on the court to interpret Article 8 in light of the Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 98. *Id.* ¶ 57–60. Via Article 31(3)(c), the court introduced the named Hague Convention into its reasoning, and read Article 8 of the ECHR in the light of its provisions. *Id.* ¶ 69–82. Interestingly, certain parts of the court's judgment give the impression that, by incorporating the Hague Convention into Article 8, it applied the Hague Convention in substance. The application of the systemic integration technique in *Carlson* would fall into the first of the three categories proposed in this Article (complementary norms).

For the Article to be consistent with the questions that have been raised in the introduction<sup>81</sup> and with the consequent presumptions that were released in Parts I and II, it must investigate the role of Article 31(3)(c) not only as an anti-fragmentation tool but also as a mechanism enabling the evolutive (dynamic) reading of the ECHR. As Part III.A explains, *theoretically* Article 31(3)(c) may be used evolutionarily in each of the three aforementioned normative scenarios, that is, in the face of complementarity, conflict of norms, and preliminary questions falling outside the ECHR's subject matter: under this hypothesis, the dynamic interpretation falls into the broader scope of systemic integration, the two methods converge and the latter absorbs the former. However, the empirical data collected from the case law of the ECtHR suggest that, *in fact*, the court relies (both tacitly and explicitly) on the dynamic/evolutive dimension of Article 31(3)(c) only in the first scenario—that is, only when there is complementarity between ECHR and extraneous norms. As such, the method of dynamic interpretation is juxtaposed against that of systemic integration only in cases in which norms are complementary. What will be demonstrated is that systemic integration and evolutive interpretative approaches both converge and diverge.

Nevertheless, the three scenarios that cover potential systemic integration of normative aspects through ECtHR case law must be distinguished from those involved at the second level, concerning potential institutional fragmentation. Part III.B discusses the rather *sui generis*, so far exceptional, and arguably abusive role that the ECtHR has assigned to Article 31(3)(c) in inhibiting institutional fragmentation in cases presenting characteristics of a prevalently *institutional* and non-normative consistency. Of course, the classifications proposed here do not claim to be exhaustive or absolute.

### A. Normative Aspects

#### 1. The Complementary Role of International Law: Pseudo-Systemic Integration?

In assessing the effect of Article 31(3)(c) as an anti-fragmentation tool, the first scenario to be examined is the ECtHR's introduction into its reasoning—by way of Article 31(3)(c)—of extraneous and relevant norms of international law that are *ratione materiae* complementary to

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81. Those include, to recall: (1) How effective can Article 31(3)(c) be as a remedy against the fragmentation of international law? (2) To what extent may the Article accommodate techniques of interpretation other than that of systemic integration? And (3), how should the relationship between these distinct interpretative methods be conceptualized?

its Convention. Before proceeding with a critical analysis of the relevant case law, it worth noting that although the ECtHR appears to apply Article 31(3)(c) (explicitly or implicitly) most frequently among international courts, the literature discussing this phenomenon is somewhat inadequate. Unsurprisingly, with the exception of some recent works,<sup>82</sup> most authors<sup>83</sup> describe the relevant case law as examples of evolutive (dynamic) interpretation and not systemic integration. The most plausible explanation for this is that the idea of Article 31(3)(c) in the service of the unity of the system was introduced by the ILC only very recently.

Another partial explanation relates to the fact that, as will be shown *infra*, systemic integration and evolutionary techniques arguably often pursue contiguous objectives—which also explains the challenges of organizing the relevant case law into categories. In this connection, this Article argues that when the two techniques of systemic integration for the purposes of normative complementarity and evolution converge, the sole criteria that determine whether the court classifies a case as one or the other are (1) the wording that the court uses and (2) whether or not it intends to emphasize the evolution. Obviously, when both methods of interpretation are based upon Article 31(3)(c) of the VCLT, the interest in distinguishing them is primarily academic. Yet the fact that the dividing line is subtle provides proof that the two techniques, although distinct and motivated by different goals, converge and have much in common. The analysis that follows concerns the cases where first, the court has put the accent on integration, and second, the instances where it emphasized evolution.

#### a. Emphasizing Integration

##### i. Opening the Convention to the Broader System in Order to Complement Its “Incomplete” Text: Substantive Aspects

This section considers the ECtHR’s use of systemic integration in instances of complementarity between the ECHR and international law. The example *par excellence* in that category of cases is the famous *Golder* judgment,<sup>84</sup> which assessed whether the right to access to justice,

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82. McLachlan, *supra* note 34, at 296; see also GARDINER, *supra* note 38, at 284–85 (describing the function of Article 31(3)(c) in this category of cases as “[f]illing gaps by reference to general international law”).

83. See, e.g., Giorgio Gaja, *Does the European Court of Human Rights Use Its Stated Methods of Interpretation?*, in 1 DIVENIRE SOCIALE E ADEGUAMENTO DEL DIRITTO: STUDI IN ONORE DI FRANCESCO CAPOTORTI 213, 219–20 (1999); Søren C. Prebensen, *Evolutive Interpretation of the European Convention on Human Rights*, in PROTECTING HUMAN RIGHTS: THE EUROPEAN PERSPECTIVE 1123, 1124–26 (Paul Mahoney et al. eds. 2000).

84. *Golder v. United Kingdom*, 18 Eur. Ct. H.R. (ser. A) 5 (1975).

although not mentioned *expressis verbis*, falls within the scope of protection offered by Article 6 of the ECHR. To support its affirmative reply, the ECtHR advanced reasoning that combined several methods of interpretation (text, context, object, and purpose),<sup>85</sup> including that of systemic integration.<sup>86</sup> In so doing, it explicitly referred to Article 31(3)(c) VCLT, explaining that

the principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally “recognised” fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice. Article 6 § 1 must be read in the light of these principles.<sup>87</sup>

Evidently, Article 6 of the ECHR and the two principles of international law to which the court referred are *ratione materiae* relevant. While it is true that the jurisdiction of the ECtHR exclusively concerns the Convention and its text, by resorting to Article 31(3)(c) of the VCLT, the court managed to open the treaty to the broader legal system and, thereby, to read its text in light of the principles prevailing in this broader system. Although the systemic integration function of Article 31(3)(c) in the *Golder* case (presumably) was successful, arguably it operated more as a bottom-up than a top-down process, which resulted in the integration of the international legal order into the ECHR. To explain this argument further: while the court *prima facie* aligned the Convention with the general principles of international law and, accordingly, the former seemingly evolved in such a way as to integrate harmonically within the broader system, integration was not the objective *per se* of the ECtHR. It is clear from the court’s reasoning and its converging, cumulative use of several interpretative techniques that the court’s ultimate aim was to reinforce the humanistic *telos* of the Convention and to broaden its semantic field in such a way as to maximize the protection offered. When the operation of Article 31(3)(c) is viewed from this perspective, the systemic integration effect is transformed into a simple collateral benefit. If, beyond integration (to the extent that integration is really achieved), the use of the systemic integration technique would not have advanced the objectives of the Convention as a human rights

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85. For an overview, see Mark E. Villiger, *Articles 31 and 32 of the Vienna Convention on the Law of Treaties in the Case-Law of the European Court of Human Rights*, in *INTERNATIONALE GEMEINSCHAFT UND MENSCHENRECHTE: FESTSCHRIFT FÜR GEORG RESS* 317, 319 (2005).

86. It is interesting to note that, for Rudolf Bernhardt, the *Golder* judgment is a globally evolutive one. See Rudolf Bernhardt, *Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights*, 1999 *GERMAN Y.B. INT’L L.* 11, 17–18.

87. *Golder*, 18 Eur. Ct. H.R. (ser. A) at 17.

(“special”) treaty, this technique would have definitely been omitted. The aim and purpose of the ECHR are reinforced in the name of (and by way of) the international legal order and its principles; in practice, the systemic integration objective operates as a supplement to the teleology of the Convention.

Arguably, in the case of complementarity between the ECtHR and the relevant norms of international law, instead of proper and full integration—in the sense that the ILC, at least, perceives it—the primary reason why Article 31(3)(c) is establishing bridges between the Convention and international law is that the former benefits from the latter through absorption of normative elements which, although absent from its “imperfect” text, are both complementary and necessary for the effective promotion of its special scopes.<sup>88</sup> That Article 31(c)(3) has a pseudo-systemic integration effect does not come as a surprise; rather, it flows as the logical consequence of the fact that normative complementarity can hardly ever cause fragmentation. Accordingly, in the absence of any risk of fragmentation, it is impossible for the systemic integration technique to produce any genuine anti-fragmentation effect. Not only does its use then come free of cost for the Strasbourg Court, but it also offers a number of significant advantages: it generously provides the court with valuable normative “loans,” offers judges an opportunity to appear greatly respectful of general international law, and thereby increases the legitimacy of judgments which, like *Golder*, would otherwise be widely accused of activist tendencies.<sup>89</sup>

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88. The case law of the ECtHR also contains examples where extraneous norms, complementary to the ECHR and introduced into the Court’s reasoning by way of systemic integration, did not result in a broadening of the *pro homine* effect of the Convention. In *Saadi v. United Kingdom*, App. No. 13229/03, 47 Eur. H.R. Rep. 17, 427 (2008), the applicant, an asylum seeker, alleged that his provisional detention while he awaited the local authorities’ decision on his refugee status application violated Article 5(1) of the Convention. The court noted that Article 5(1)(f) of the ECHR provides an exception explicitly permitting states to detain aliens in an immigration context and held that the effect to be given to that exception should also cover asylum seekers—thus, as long as a state respects all other conditions emanating from Article 5, asylum seekers may be legally detained until the state authorizes entry. In reaching that conclusion, the court considered instruments of international law (and soft law) that are complementary to Article 5(1)(f) of the ECHR. *Saadi*, 47 Eur. H.R. Rep. at 427, 449. Evidently, the outcome of systemic integration in *Saadi* did not reinforce the human rights teleology of the Convention. It did, however, both complement and broaden the *telos* of the exception of Article 5(1)(f), the *raison d’être* of which is apparently to limit the effect of the general prohibition of the illegal deprivation of liberty. Hence, here again a pseudo-systemic integration technique reinforced the text of the ECHR. The reason why it did not equally lead to a reinforcement of the humanistic object and purpose of the Convention is simply because the very object and purpose of the exception established by Article 5(1)(f) is to limit the effect of Article 5(1).

89. The *Golder* judgment was far from unanimous and was severely criticized as imposing new obligations on the parties. *See, e.g., Golder v. United Kingdom*, 18 Eur. Ct. H.R. (ser. A) 5, 24 (1975) (Verdross, J., separate opinion) (arguing that the Court’s *dictum* failed to

All the same, it would be a mistake to conclude from the *Golder* example that the sole influence on the court was general international law. Even if the court does not rely explicitly on Article 31(3)(c) of the VCLT in all cases, its practice shows that it tends to interpret the ECHR in light of the other sources of international law, including soft law<sup>90</sup> and international treaties (which, by definition, have only a relative effect and cannot be binding on the respondent state, unless the latter has duly signed and ratified them). Nevertheless, in all these instances, the effect of the “pseudo-systemic integration” technique is identical: Article 31(3)(c) comes into play as an accessory of the object and purpose method of interpretation and, by expanding the semantic field of the Convention’s substantive provisions, and after successfully transplanting into it the complementary relevant norms of international law, it leads to the reinforcement of its human rights *telos*.

To give just a few of many examples, in the *Soering* case<sup>91</sup> the ECtHR twice took implicit advantage of the possibilities offered by Article 31(3)(c) VCLT. First, it did so in order to decide whether the extradition of a person to a state where he risked the death penalty fell into the normative frame of Article 3 of the ECHR. It noted, *inter alia*, that the absolute prohibition of the conduct described by the Article was also “found in similar terms in other international instruments such as the 1966 International Covenant on Civil and Political Rights and the 1969 American Convention on Human Rights and [was] generally recognized as an internationally accepted standard.”<sup>92</sup> For the court, the fact that the right not to be extradited to a state where a person might be tortured is explicitly protected by other specialized international instruments “did not mean that an essentially similar obligation [was]

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respect the exigencies of another principle of law, namely of that of legal certainty); *id.* at 26–31 (Zekia, J., separate opinion) (giving greater importance to the intention of the parties and to the grammatical analysis of Article 6); *id.* at 49–50 (Fitzmaurice, J., separate opinion) (“[T]he Statute of the Council of Europe . . . ; the principle of the rule of law; and the ‘general principles of law recognized by civilized nations’ mentioned in Article 38, paragraph I (c), of the Statute of the International Court of Justice;—all these are factors external to Article 6.1 of the Human Rights Convention, and having little or no direct bearing on the precise point of interpretation involved . . . . They might be useful as straws to clutch at, or as confirmatory of a view arrive at *aliter*—they are in no way determining in themselves, even taken cumulatively.”) (citation omitted).

90. *Contra* MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 433 (2009) (arguing that “the term ‘applicable’ [in Article 31(3)(c) of the VCLT] leaves no room for doubt: *non*-binding rules cannot be relied upon”). However, these non-binding rules may be taken into consideration if they reflect the emergence of a customary norm. For more details on the issue and examples of the various opinions that have been expressed within the scholarship, see *infra* notes 103, 105, 108–109.

91. See *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989).

92. *Id.* at 34.



not already inherent in the general terms of Article 3.”<sup>93</sup> Second, the court applied Article 31(3)(c) in relation to the question of whether the applicant’s age should be of any importance to the decision of the court. In so doing, the court gave an extensive list of international instruments prohibiting the death penalty for minors and concluded that, even though the ECHR did not contain such an explicit prohibition, “as a general principle the youth of the person concerned is a circumstance which is liable, with others, to put into question the compatibility with Article 3 of measures connected with a death sentence.”<sup>94</sup>

Likewise, in *V. v. United Kingdom*,<sup>95</sup> the ECtHR implicitly applied Article 31(3)(c) twice within the same case. The second application did not introduce any particularly innovative elements: the aim was to facilitate the court’s reply to the claims of the applicant—a youth condemned by domestic courts for the perpetration of serious offenses—that detention sentence imposed on her/him in conformity with a system specific to the United Kingdom (detention during Her Majesty’s pleasure) breached Article 3 of the ECHR. The Strasbourg court interpreted the Convention in light of relevant international law treaties and, notably, soft law documents (mainly the U.N. General Assembly’s “Beijing Rules” concerning the “Standard Minimum Rules for the Administration of Juvenile Justice”)<sup>96</sup> to conclude that the Convention does not prohibit states from subjecting a child convicted of a serious crime to an indeterminate sentence.<sup>97</sup>

More interesting was the second application of Article 31(3)(c) by the court in *V. v. United Kingdom*. The question before the ECtHR was whether the fact that the criminal proceedings against the minor applicant took place in public and that her/his name was published amounted to a violation of Article 3 of the ECHR. Although the ECtHR silently applied the pseudo-systemic integration technique and, through it, referred to the very same external norms as in the previous example,<sup>98</sup> this time it also did so from the perspective of evolution and intertemporality. The wording of the judgment placed explicit emphasis on the evolution that had taken place over the issue in question at the international level: the court highlighted the existence of “an international tendency in favour of the protection of the privacy of juvenile defendants” and held that “the existence of such a trend is one factor to be

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93. *Id.* at 35.

94. *Id.* at 43, ¶ 108.

95. *V. v. United Kingdom*, App. No. 24888/94, 30 Eur. H.R. Rep. 121 (Eur. Ct. H.R. 1999).

96. *Id.* at 143–83.

97. *Id.* at 183.

98. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at 30–31, ¶ 76 (1989).

taken into account.”<sup>99</sup> Admittedly, one cannot give much weight to this unobtrusive reference by the court to the dynamism of the relevant hard and soft law norms. Omitting this reference would not have significantly changed its reasoning. Its importance is, rather, of symbolical value: it denotes that, exactly as the ILC suggests, the evolutive dimension is *inherent* to the systemic integration one—a position that, as will be demonstrated *infra*, this paper embraces, as long, of course, as the evolution stems from the international order and not the inner world of its special regimes.

In its recent judgment in *Demir v. Turkey*, the court confirmed the interrelation between systemic integration and evolutive interpretation.<sup>100</sup> Specifically, it explained that no matter whether a respondent state is formally bound by the relevant instruments of international law, “[i]t will be sufficient for the Court that [these relevant instruments of international law] denote a continuous evolution in the norms and principles applied in international law.”<sup>101</sup> Had the Grand Chamber of the court not chosen this case to provide a general roadmap for the use of Article 31(3)(c) of the VCLT, the *Demir* judgment would have been just another on the list confirming the findings of the analysis done here; that is, the reason why the court referred to a number of complementary international hard and soft international law instruments in *Demir* was—as in the other cases discussed in this Article—in order to better serve the object and purpose of the Convention.

After recalling its power to interpret the Convention in the light of international law,<sup>102</sup> the Grand Chamber clarified that nothing prohibits it from also taking into account non-binding documents,<sup>103</sup> or treaties that have not been ratified by the respondent state.<sup>104</sup> “The Court observe[d] . . . that in searching for common ground among the norms of international law it has never distinguished between sources of law according to whether or not they have been signed or ratified by the respondent State.”<sup>105</sup> Although the impression initially given by the court was that it

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99. *V. v. United Kingdom*, 30 Eur. H.R. Rep. at 176–77.

100. *Demir v. Turkey*, App. No. 34503/97, 48 Eur. H.R. Rep. 1272 (2009).

101. *Id.* at 1297.

102. *Id.* at 1293.

103. *Id.* at 1294. *Contra* ORAKHELASHVILI, *supra* note 34, at 366 (arguing that “Article 31(3)(c) covers only established rules of international law, to the exclusion of principles of uncertain or doubtful legal status, so-called evolving legal standards, policy factors or more generally related notions”).

104. *Demir*, 48 Eur. H.R. Rep. at 1295.

105. *Id.* The more theoretical question raised here concerns whether all the parties to the treaty being interpreted need also be parties to the treaty relied upon for interpretation purposes. The wording of Article 31(3)(c), which simply requires that the relevant rules of international law be “applicable in the relations between the parties,” is substantially vague and therefore not of any particular help. *See* Duncan French, *Treaty Interpretation and the*

felt free to rely upon any international treaty without regard to whether the treaty was binding on the parties, it later explained that it is allowed to do so only to the extent that the non-binding treaty reflects the parties' "common values."<sup>106</sup> Hence, as long as the specialized international instruments reflect a dynamic "emerging consensus" at the international level, they may perfectly well constitute a relevant consideration for the court.<sup>107</sup> Self-evidently, this is another name describing international custom in *statu nascendi*.<sup>108</sup> Even if the customary rule is not yet crystallized, it at least reflects the "common intentions" of the signatory parties to the ECHR.<sup>109</sup>

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*Incorporation of Extraneous Legal Rules*, 55 INT'L & COMP. L.Q. 281, 307 (2006) (noting that "neither the provision itself nor its negotiating history provides a definitive answer to these questions of applicability"); see also Ulf Linderfalk, *Who Are 'The Parties'? Article 31, Paragraph 3(c) of the 1969 Vienna Convention and the 'Principle of Systemic Integration' Revisited*, 55 NETH. INT'L L. REV. 343 (2008) (defending the idea of the strictest possible interpretation and reading the term "parties" in Article 31(3)(c) as all parties to the interpreted treaty). But see *id.* at 345 n.8 (discussing scholars who disagree with such a narrow interpretation of Article 31(3)(c), including, among others, Petros Mavroidis, Joost Pauwelyn, Campbell McLachlan, and Duncan French). However, within the literature consensus exists that treaties such as the ECHR, which introduce obligations *erga omnes partes*, should be excluded from the broad interpretation of the term "parties" in Article 31(3)(c). As a general rule, the ILC suggests that "a better solution is to permit reference to another treaty provided that the *parties in dispute* are also parties to that other treaty." ILC, *Final Report on Fragmentation of International Law*, *supra* note 28, ¶ 472. Despite the evident risk of divergence in the interpretation of a treaty that this choice entails,

[such a] risk . . . would be mitigated by making the distinction between "reciprocal" or "synallagmatic" treaties (in which case mere "divergence" in interpretation creates no problem) and "integral" or "interdependent" treaties (or treaties concluded *erga omnes partes*) where the use of that other treaty in interpretation should not be allowed to threaten the coherence of the treaty to be interpreted.

*Id.*

106. Demir v. Turkey, App. No. 34503/97, 48 Eur. H.R. Rep. 1272, 1297 (2009).

107. See *id.*

108. Campbell McLachlan is rather critical of the idea that provisions of an international treaty to which not all the parties are bound should have acquired the status of international custom in order to be invoked. McLachlan, *supra* note 34, at 314. *Inter alia*, McLachlan argues that such an approach would preclude reference to treaties which, although widely accepted in the international community, are neither universally ratified nor accepted in all respects as stating customary law. *Id.*

109. The ILC seems to offer quite wide discretion to international judges. For treaty-based rules to be introduced into judicial reasoning, it is enough that "[the rules] provide evidence of the common understanding of the parties as to the object and purpose of the treaty under interpretation or as to the meaning of a particular term." 2006 ILC Report, *supra* note 49, ¶ 251(1)(21). Or, more precisely:

[I]t might also be useful to take into account the extent to which that other treaty relied upon can be said to have been "implicitly" accepted or at least tolerated by the other parties "in the sense that it can reasonably be considered to express the common intentions or understanding of all members as to the meaning of the . . . term concerned." This approach has in fact been adopted in some of the decisions of the

For a traditional international lawyer, the court's approach in the *Demir* case would have to be squarely rejected as it absolutely neglects states' will and the doctrinal premises of the voluntarist theory. It is, however, more than obvious that the ECtHR has opted for a *pro homine*, objectivist reading of the Convention *in fine*. Nonetheless, no one can accuse the court of disingenuity. With its *dictum*,<sup>110</sup> it openly admits that what this Article has defined as a pseudo-systemic integration should be placed under the broader umbrella of the object and purpose of the Convention. Hence, "when [the ECtHR] considers the object and purpose of the Convention provisions, it also takes into account the international law background to the legal question before it."<sup>111</sup> Indeed, but for a "minor" detail, the Strasbourg Court is exceptionally frank. Yet, what it still does not avow is that the effective transmutation of Article 31(3)(c) into a complement to the teleological reading of the Convention depends upon one important precondition: the relevant norms of international law must be complementary to the Convention.

## ii. Opening the Convention to the Broader System in Order to Complement Its "Incomplete" Text: Non-Substantive Aspects

Interestingly, ECtHR case law illustrates that this opening of the Convention to complementary elements of the broader international legal system is not limited to substantive law. While an activist court like the ECtHR may, in the name of the humanistic object and purpose of the Convention and by means of Article 31(3)(c), accommodate within its regime the substantive evolution taking place within the international

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WTO Appellate Body. It gives effect to the sense in which certain multilateral treaty notions or concepts, though perhaps not found in treaties with identical membership, are adopted nevertheless widely enough so as to give a good sense of a "common understanding" or a "state of the art" in a particular technical field without necessarily reflecting formal customary law.

ILC, *Final Report on Fragmentation of International Law*, *supra* note 28, ¶ 472. The ILC is referring explicitly to the work of Joost Pauwelyn, who was the first to note (in the context of WTO law) that

the requirement is not that *all* the parties to the WTO agreement have, one after the other, formally and explicitly agreed with the non-WTO rule, nor even that this rule is otherwise *legally binding* on *all* WTO members. It could be submitted that the criterion is rather that the rule can be said to be at least *implicitly* accepted or tolerated by all WTO members, in the sense that the rule can reasonably be said to express the common intentions or understanding of all members as to what the particular WTO term means.

JOOST PAUWELYN, *CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW* 261 (2003).

110. The Article uses the term *dictum* in the sense of judicial *dictum*, that is, the product of a comprehensive discussion of legal issues.

111. *Demir*, 48 Eur. H.R. Rep. at 1295.

legal order, it may not be so welcoming to changes having an impact on the Convention's systemic structures or the court's institutional organization and powers.

In *Mamatkulov & Abdurasulovic v. Turkey*,<sup>112</sup> the court examined whether the interim measures prescribed under Rule 39 of its Rules of Court<sup>113</sup> are obligatory upon states. Although its analysis focused on an evolutive interpretation of the Convention,<sup>114</sup> which aimed at the effective protection of established rights,<sup>115</sup> the ECtHR also examined the issue in the light of Article 31(3)(c) of the VCLT, with reference to general principles of international law and "in particular those concerning the binding force of interim measures indicated by other international courts."<sup>116</sup> Only after an impressively extensive reference to the relevant international practice and case law of other international fora<sup>117</sup> did the court conclude that "in the light of the general principles of international law, the law of treaties and international case-law, the interpretation of the scope of interim measures cannot be dissociated from the proceedings to which they relate or the decision on the merits they seek to protect."<sup>118</sup> Thus, interim measures should always be seen in the light and the context of the merits of a case.

Nevertheless, despite recent trends at the international level over the question of the binding force of the interim measures, it is difficult to see how a "one size fits all" logic can prevail and equip each and every international judicial forum with such a power in the absence of or even against state consent,<sup>119</sup> while this consent provides the exclusive source

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112. *Mamatkulov & Abdurasulovic v. Turkey*, App. Nos. 46827/99 & 46951/99 (Eur. Ct. H.R. Feb. 6, 2003). The approach was also confirmed by the Grand Chamber of the ECtHR. See *Mamatkulov & Askarov v. Turkey*, 2005-I Eur. Ct. H.R. 225, 330 (2005).

113. Rule 39(1) of the ECtHR's Rules of Court provides that "[t]he Chamber or, where appropriate, its President may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it." Eur. Ct. H.R. Rules of Court 39(1) (2009), available at <http://www.echr.coe.int/NR/rdonlyres/D1EB31A8-4194-436E-987E-65AC8864BE4F/0/RulesOfCourt.pdf> (last visited Mar. 26, 2010).

114. See *Mamatkulov & Abdurasulovic*, App. Nos. 46827/99 & 46951/99, at ¶ 94 (Eur. Ct. H.R. Feb. 6, 2003).

115. See *id.* ¶ 105.

116. *Id.* ¶ 98.

117. *Id.* ¶¶ 39-54, 100-03.

118. *Id.* ¶ 105.

119. See *Mamatkulov & Askarov v. Turkey*, 2005-I Eur. Ct. H.R. 225, 356 (2005) (Caflisch, Turmen, & Kovler, J.J., joint partly dissenting) (suggesting that "the matter examined here is one of *legislation* rather than of *judicial action*" and that "[a]s neither the constitutive instrument of this Court nor general international law allows for holding that interim measures must be complied with by States, the Court cannot decide the contrary and, thereby, impose a new obligation on States Parties"); cf. Antonios Tzanakopoulos, *Provisional Measures Indicated by International Courts: Emergence of a General Principle of Interna-*

of competence for every international judicial instance. Apparently, the systemic integration function of Article 31(3)(c) is actually comparative<sup>120</sup>—by shedding light on the institutional evolution taking place within different regimes, it leads to a *prima facie*, groundless, and *ultra vires* institutional mimetism.<sup>121</sup>

A more tempered approach takes into account that, in ECtHR practice, interim measures are a tool applied only exceptionally and in cases of urgency in order to prevent imminent or actual heinous human rights violations threatening the victim's existence or physical integrity.<sup>122</sup> For example, in *Mamatkulov & Abdurasulovic* the applicants complained that their lives were at risk and they were in danger of being tortured after they were extradited to their home state in breach of the interim measures ordered by the court. That explained, it is easier to understand the court's point when it linked interim measures to Article 34 of the Convention,<sup>123</sup> under which states parties "under[took] not to hinder in any way the effective exercise of" the right to individual application. The scope of interim measures could not be dissociated from the proceedings to which they related and the merits they sought to safeguard, that is to say, the object and purpose of human rights. In short, here again, the pseudo-systemic integration function of Article 31(3)(c) appears to be inseparably (albeit indirectly) linked to the substantive *telos* of the ECHR. Accordingly, it can be safely concluded that the *Mamatkulov & Abdurasulovic dictum* is neither more nor less activist than that of all the other decisions in which Article 31(3)(c) has found an application for the reinforcement of the Convention's substantive provisions.

A second example confirms the argument that has been built so far, namely that the court may legitimately use Article 31(3)(c) of the VCLT

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tional Law, 57 REVUE HELLÉNIQUE DE DROIT INTERNATIONAL 53 (2004) (diagnosing, after proceeding with a thorough analysis of the judicial practice of a number of international fora, the crystallization of a general principle in international law over the binding effect of provisional measures).

120. See Franz Matscher, *Introduction: Les contraintes de l'interprétation juridictionnelle: Les méthodes d'interprétation de la Convention européenne*, in L'INTERPRÉTATION DE LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME 15, 30 (Frédéric Sudre ed., 1998). According to the author, in order for the ECtHR to find the ordinary meaning of a term it may, by means of comparison, refer to international instruments other than the ECHR. Evidently, this is another way of referring to systemic integration. See also De Schutter, *supra* note 54, at 87–88 (arguing that the comparative analysis is indeed an expression of the evolutive method of interpretation.) Once again, the two methods—systemic integration and evolutive—converge.

121. This term was introduced into the vocabulary of political science by Yves Mény, *La greffe et le rejet: Les politiques du mimétisme institutionnel*, in LES POLITIQUES DU MIMÉTISME INSTITUTIONNEL: LA GREFFE ET LE REJET 7, 7 (Yves Mény ed., 1993).

122. *Mamatkulov & Askarov*, 2005–I Eur. Ct. H.R. at 328.

123. *Mamatkulov & Abdurasulovic v. Turkey*, App. Nos. 46827/99 & 46951/99, ¶ 107 (Eur. Ct. H.R. Feb. 6, 2003).

to strengthen the Convention's human rights teleology only for substance-related issues. In its very first advisory opinion,<sup>124</sup> the ECtHR was called to answer whether the Parliamentary Assembly (P.A.) of the Council of Europe could legally refuse to accept a list of candidates for judge at the ECtHR submitted by a member state solely on the basis of gender-related issues, even when the list formally satisfied all conditions imposed by the ECHR. An alternative way of formulating this question would be to ask whether the practice of the P.A., which required states to include at least one candidate belonging to the under-represented sex in their list of three candidates (a positive measure against the under-representation of female judges at the ECtHR), constituted an institutional custom having a normative effect complementary to the text of the Convention.

The court's point of departure was the text of the Convention and, more specifically, its provisions concerning the criteria and the procedure for the election of judges.<sup>125</sup> These were read as imposing a non-exhaustive number of conditions, with no explicit limits on the criteria that could be employed by the P.A.<sup>126</sup> On this view, the P.A. enjoyed wide discretion in developing practices that would guarantee that the criteria implicit to the Convention's incomplete text would be satisfied.<sup>127</sup> However, the court concluded that the criterion relating to the candidates' gender lacked links to the Convention's text<sup>128</sup> and therefore could not fall within the P.A.'s implied powers. Nevertheless, the court sought alternate grounds on which to justify the gender criterion. After stressing the legitimacy of the P.A.'s gender-equality policy, the court silently applied Article 31(3)(c)—this time under a so-called “comparative analysis”<sup>129</sup>—and tried to demonstrate the existence of a “far-reaching consensus as to the need to promote gender balance within the State and in the national and international public service, including the judiciary.”<sup>130</sup> Once again, the examples given by the court stem from both relevant instruments of international law and the practice of other inter-

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124. Advisory Opinion on Certain Legal Questions Concerning the Lists of Candidates Submitted with a View to the Election of Judges to the European Court of Human Rights (Eur. Ct. H.R. 2008), available at <http://www.echr.coe.int/echr/> (last visited Mar. 27, 2010).

125. *Id.* ¶ 45; see also ECHR, *supra* note 3, arts. 21–22.

126. Advisory Opinion on Certain Legal Questions Concerning the Lists of Candidates Submitted with a View to the Election of Judges to the European Court of Human Rights, ¶ 45 (Eur. Ct. H.R. 2008).

127. See *id.* ¶¶ 45–47.

128. *Id.* ¶ 48.

129. Advisory Opinion on Certain Legal Questions Concerning the Lists of Candidates Submitted with a View to the Election of Judges to the European Court of Human Rights, at ¶ 34 (Eur. Ct. H.R. 2008), available at <http://www.echr.coe.int/echr/> (last visited Mar. 27, 2010).

130. *Id.* ¶ 49.

national institutions, especially systems of the other judicial fora.<sup>131</sup> The results of this comparative approach, although not entirely satisfactory,<sup>132</sup> convinced the court of the existence at the international level of an (evolutive) trend towards the promotion of gender balance.<sup>133</sup>

This use of the comparative/evolutive method in its reasoning would likely create in connoisseurs of ECtHR case law an expectation that the court would conclude with an affirmation of a consensus-stemming trend in international law in favor of gender balance, and that it would evoke from this a complementary effect on the text of the Convention. However, to the disappointment of the adherents of international legal objectivism, the court looked to the *volonté* of the member states, as reflected in the practice of another organ of the Council of Europe, namely the Committee of Ministers. The court concluded that by deliberately choosing to “not to act upon the Assembly’s proposals to amend Article 22 of the Convention,”<sup>134</sup> the Committee proved that “the Contracting Parties, which alone have the power to amend the Convention, ha[d] thus set the boundaries which the Assembly may not overstep.”<sup>135</sup> Therefore, the court had to refrain from basing its decision on the relevant practice of the other international institutions. This was the only way for it to restrain its propensity for activism. Evidently, one of the most important factors explaining this decision was the explicit refusal by states to endorse the P.A.’s institutional practice. Given the particular circumstances of the case, the court had no other choice than to give priority to the will of the contracting parties. While its argument was absolutely valid, it is also important to highlight, however, the fact that the court left aside the object and purpose reading of the Convention. An institutional question that, despite its indisputable legitimacy, has only limited (if any) links to the Convention’s substantive provisions leaves no space for a teleological interpretation.

#### b. Emphasizing Evolution

In addition to assessing the function of systemic integration with regard to complementary norms, the examples presented so far have sought to demonstrate that the above-mentioned technique is efficient enough to open the Convention’s box to the broader international legal system, fulfilling a special aim of capturing the evolution and socio-normative tendencies within this broader system. In a nutshell, the findings of the analysis indicate that the systemic integration technique can

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131. *Id.* ¶¶ 30–35, 49.

132. *See id.* ¶ 34.

133. *Id.* ¶ 49.

134. *Id.* ¶ 50.

135. *Id.* ¶ 51.



very well accommodate the evolutive one. As far as the opposite is concerned, by definition, the evolutive method of interpretation always seeks to incorporate the evolution constantly taking place in the broader socio-normative environment within which a given norm is created or situated and into which it is integrated. Thus, the two techniques not only converge and complement each other but also share their legal basis in Article 31(3)(c) of the VCLT.

However, this can only be true if the dynamic reading of the Convention is made with reference to the international legal system. The first part of the analysis that follows will focus on cases of convergence between the systemic integration and evolutive methods through a dynamic reading of the ECHR that references international law. In contrast, the second part will attempt to show that when courts applying the evolutive technique look to normative sources from outside the international order, not only is it impossible for this technique to converge with the systemic integration method, but it may even ultimately introduce within international law changes that are (sometimes) difficult to digest, and that as a result the evolutive technique can sabotage the anti-fragmentation objective of Article 31(3)(c).

#### i. ECHR Evolution Following the Tempo of the International Legal Order

Outside the *V. v. United Kingdom* case discussed *supra*, another interesting example of convergence between the systemic and the dynamic techniques is the *Sigurjónnson* case,<sup>136</sup> which involved the right of association. The court, after referring to the Universal Declaration of Human Rights, the Community Charter of the Fundamental Social Rights and the practice of the International Labour Office, concluded that “a growing measure of common ground has emerged . . . at the international level,”<sup>137</sup> guaranteeing the so-called negative aspect of the freedom of association, that is, the freedom to not join or to withdraw from an association. It concluded that the effect given to the Convention had to be adapted to encompass the growing measure. Although the court did not focus on the object and purpose method of interpretation, it explicitly rejected the possibility of giving priority to states’ will as reflected in the *travaux* of the Convention.<sup>138</sup>

The second example of convergence between the systemic and the dynamic techniques is equally clear and significant. This significance stems from the fact that the reason why the court investigated the ongo-

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136. *Sigurjónnson v. Iceland*, 264 Eur. Ct. H.R. (ser. A) (1993).

137. *Id.* at 15.

138. *Id.*

ing evolution in the international system did not have to do with the delimitation of the semantic field of a Convention provision; rather, the court used Article 31(3)(c) to attribute a special normative quality to Article 3 of the ECHR, which prohibits torture. In order to conclude in the *Al-Adsani* case<sup>139</sup> that the obligations of Article 3 are of a *jus cogens* nature, the court proceeded by giving an extensive list of relevant international instruments and case law that confirm this approach.<sup>140</sup> Accordingly, in the court's words:

Other areas of public international law bear witness to a growing recognition of the overriding importance of the prohibition of torture. . . . In addition, there have been a number of judicial statements to the effect that the prohibition of torture has attained the status of a peremptory norm or *jus cogens*.<sup>141</sup>

Hence, the relevant inputs from international law demonstrated that the prohibition of torture has evolved and that it had "achieved"<sup>142</sup> the status of *jus cogens*.

In all the instances that have been presented so far, Article 31(3)(c) facilitates both dynamism in interpretation and pseudo-integration. Without regard to whether the court highlights integration or evolution, the function of Article 31(3)(c) is in substance identical. It acts as a supplement to the teleological method of interpretation and facilitates the effective widening of the scope and effect of the ECHR's substantive provisions.

#### ii. Beyond Article 31(3)(c) VCLT: The ECHR at the Forefront of International Evolution

As argued *in extenso supra*, the ECHR is a special international law treaty in the sense that, *inter alia*, it is indissolubly attached to the idea of a regional quasi-constitution destined to promote Europe's public order effectively. Consequently, the Convention's dualistic nature allows ECtHR judges to feel equally competent to investigate socio-normative evolution both in the international legal order and in what (in Union law terms) is usually called the common constitutional traditions of the contracting parties. Hence, the systemic integration-oriented, dynamic interpretation of the ECHR constitutes only one of the two faces of the evolutive method. Dynamism in the reading of the ECHR is not limited to the impact of the international legal order. Quite the contrary, it

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139. See *Al-Adsani v. United Kingdom*, 2001–XI Eur. Ct. H.R. 79.

140. *Id.* at 92–93.

141. *Id.* at 101.

142. *Id.*

extends well beyond the confines of that order and Article 31(3)(c) of the VCLT.

That neither the ECHR regime nor the international legal order contains an equivalent to Article 31(3)(c) that explicitly enables the ECtHR to proceed with an “endoscopic” evolutive interpretation may easily be remedied either by analogy of law or, more simply, by resorting to the well-established practice of the court.

The functions of the evolutive/dynamic method can be thought of as a *sui generis* periscope, which offers both an endoscopic and a telescopic field of vision through exposure to both municipal (endoscopic) and international (telescopic) law. Although only the latter is linked directly to Article 31(3)(c), the systemic integration technique and the objective of maintaining the unity of international law, the interrelation of the dynamic technique’s two dimensions is circular. What the court does in substance when—as the next few examples will show—it considers evolution occurring in the national legal sphere, is investigate state practice and the respective *opinio juris*. In other words, the court inquires into the emergence of international normative trends, if not of established customary rules. In this sense, the endoscopic version of the dynamic technique reflects evolution occurring within the broader international legal system. If this is true, then the way lies open for the court to take into account the socio-normative progress that arises within the municipal orders of both its contracting parties and third states. The only conditions for doing so are that the evolution in question present the qualitative and quantitative characteristics that amount to the emergence of a well-established normative trend and that they do not result in a simple, vague, and infertile comparison, since doing so would unavoidably lead to unjustified judicial activism.

The first example concerns one of the most famous judgments of the court. In the *Marckx* case,<sup>143</sup> the court assessed problems of equality between children born in and out of wedlock using an evolutive interpretation based on both national and international law. Hence, “the Court [could not] but be struck by the fact that the domestic law of the great majority of the member States of the Council of Europe ha[d] evolved and [were] continuing to evolve, in company with the relevant international instruments, towards full juridical recognition of the maxim ‘*mater semper certa est*.’”<sup>144</sup> Although the evolution of the issue was, at that time, far from well-established at the international level and only a very small number of states had ratified the relevant international instruments, “this state of affairs [could not] be relied on in opposition to

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143. See *Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A) (1979).

144. *Id.* at 19–20.

the evolution noted above.”<sup>145</sup> By validating this dynamic state practice, the court—as usual—expanded the semantic field of its Convention’s provisions and thereby reinforced its *telos*. Beyond this, the ECtHR validated a dynamic *opinio juris* that was by that time emerging at the regional level and, at the same time, it internationalized the respective practice. As a result, the court brought the ECHR to the forefront of international evolution, and the broader international system added one more special instrument evolving towards the direction suggested by the ECtHR.

In a second example, the court notably chose to base its *dictum* on the domestic practice of a handful of non-contracting parties. In its judgment in the *Christine Goodwin* case,<sup>146</sup> the ECtHR extended legal status to post-operative transsexuals, clearly departing from previous case law<sup>147</sup> that had granted state authorities a margin of appreciation in determining this status. Despite a lack of social consensus at the European level,<sup>148</sup> the court opted for a dynamic interpretation based on “the clear and uncontested evidence of a continuing international trend in favour . . . of legal recognition of the new sexual identity of post-operative transsexuals.”<sup>149</sup> As proof of this trend, the court gave the examples of domestic practice in “Singapore, . . . Canada, South Africa, Israel, Australia, New Zealand and all except two of the States of the United States of America.”<sup>150</sup> Although one may agree with the court’s decision to impose common standards, one should nevertheless take note that the use of the evolutive method of interpretation in *Goodwin* resembles a fairly maladroit correction of its previous case law rather than an adaptation to a genuine dynamic social change. Consequently, the Court’s *dictum* seems to be deprived of any profound socio-normative foundations and, therefore, instead of following an international tempo, seems instead to aspire to introduce a change in tempo.

That said, the more useful theoretical question is whether such a pushy interpretation of the Convention may contribute to normative fragmentation. In order to answer this question, one should not overlook the particularity of the subject matter of human rights and the fact that this specific discipline of law reflects certain values that are possibly universally accepted at a macro level. When the question comes, however, to the *ad hoc* standards of protection or to the priority that should be given to certain values over others, such consensus—at least at the

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145. *Id.* at 19.

146. *See Christine Goodwin v. United Kingdom*, 2002–VI Eur. Ct. H.R. 1.

147. *See sources cited supra* note 58.

148. *Goodwin*, 2002–VI Eur. Ct. H.R. at 21, 29–30.

149. *Id.* at 30.

150. *Id.* at 21.

global level—does not exist. The international legal order is, nevertheless, able to accommodate multiple standards of human rights protection. Normative fragmentation will only occur if the standards of protection applied at the regional level become thinner than those prevailing at the universal level. In other words, there is plenty of room for flexibility.

Yet, if one leaves aside the axiological (and therefore by definition greatly subjective) field of human rights, the answer at a more general level to the question of whether an “endoscopic” (that is, divergent from systemic integration and not supported by Article 31(3)(c)) application of the evolutive method of interpretation may contribute to the fragmentation of international law depends upon two main factors. First, it depends on the socio-normative state of affairs of a given subject matter within the international legal order. Second, it depends on whether and to what extent an order such as the international legal one is likely to evolve in the direction towards which the *dictum* of an international court points. Hence, even if particular case law is seen to contribute to *prima facie* fragmentation of international law—and therefore, to impede Article 31(3)(c)’s systemic integration objective—there is nothing to suggest that this characteristic will not be temporary. International society is far from static: by nature, its legal order undergoes constant evolution and what might today appear as an activist and illegitimate judicial interpretation may tomorrow turn into a pioneering exposition which, instead of challenging the uniformity of international law, will occupy a central and legitimate place within it.

The general conclusion to be reached from the analysis of this first category of case law (discussing the use of Article 31(3)(c) by the ECtHR in the case of complementarity between the ECHR and international law) is twofold. First, the systemic integration method functions in reality as a complement to the teleological interpretation and, rather than producing effective anti-fragmentation results, in reality it “uses” international law in order to reinforce the object and purpose of the Convention. Yet this applies only with regard to the substantive norms of the Convention. Second, although the systemic integration method and the evolutive technique do converge under Article 31(3)(c), the (endoscopic version of the) evolutive method of interpretation extends well beyond the scope of systemic integration, makes reference to sources of evolution different than international law, and produces results that, under certain conditions, may even challenge the normative consistency of the international legal order. That being sustained, the Article now moves in discussing the second scenario of normative systemic integration, that is, the case of conflicts between the norms of the ECHR and international law.

## 2. Conflict Between Norms of International Law and the ECHR

If there is one area in which it is important for systemic integration technique to produce effective anti-fragmentation results, it is in cases in which norms conflict. Even when a particular judgment remains silent as to the applicability of Article 31(3)(c), the latter comes into action *ipso facto*. Even so, what is significant is that relevant norms of international law introduced into judicial reasoning are *not* those that the court considers relevant, but rather those that are introduced de facto by the circumstances of a case and are in conflict with the Convention. The examples that follow concern three types of conflicts respectively: (1) conflicts between the ECHR and general international law; (2) conflicts between the ECHR and other treaties of international law which produce a relative normative effect for its parties; and (3) conflicts between human rights treaties.

The best example of a conflict between the ECHR and general international law is the *Al-Adsani* judgment,<sup>151</sup> discussed *supra* as an example of convergence between systemic integration and evolutive methods of interpretation. In a second application of Article 31(3)(c) of the VCLT, the ECtHR in *Al-Adsani* addressed whether the application of the international law rule of state immunity legitimately restricted the applicant's right of access to justice, that is, a right, according to the Court's case law, which is inherent to Article 6 of the ECHR. By resorting to Article 31(3)(c), the court recalled that "[t]he Convention, including Article 6, [could not] be interpreted in a vacuum. . . . [It] should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity."<sup>152</sup> This is the reason why, according to the Court

measures taken . . . which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court . . . . [S]ome restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the doctrine of State immunity.<sup>153</sup>

Based on this *Al-Adsani dictum*, one could easily reach—incorrectly—the conclusion that a right guaranteed by the ECHR can

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151. *Al-Adsani v. United Kingdom*, 2001–XI Eur. Ct. H.R. 79. For similar cases on this point, see also *Fogarty v. United Kingdom*, 2001–XI Eur. Ct. H.R. 157; *McElhinney v. Ireland*, 2001–XI Eur. Ct. H.R. 37; *Kalogeropoulou v. Greece*, App. no. 59021/00 (Eur. Ct. H.R. 2002) (decision as to the admissibility).

152. *Id.* at 100.

153. *Id.*

lawfully be restricted by a conflicting norm of general international law, which, *ratione materiae*, constitutes *lex specialis*. However, a precondition for *lex specialis* to supersede in a conflict of norms is that the norms are of the same nature (that is, of the same hierarchical rank). If this had been the case in *Al-Adsani*, then the *lex specialis* norm, which covers immunities, would naturally have excluded the application of the conflicting *lex generalis*, that is, Article 6 of the ECHR, and the debate over the court's choice would have been simple.<sup>154</sup>

However, as explained earlier, the Convention's substantive provisions introduce obligations *erga omnes partes*. The consequences of this normative quality for *Al-Adsani* are twofold. First, the logic of *lex specialis* does not apply to norms not of equivalent standing. Second, given that the right to access to justice is a typical *erga omnes partes* obligation, it is—like all non-*jus cogens* norms—susceptible to legitimate limitations: the legality and the extent of these limitations are measured through the well-known proportionality test—a technique used to set priorities after balancing the material significance of the conflicting norms in light of circumstances particular to a given case. Yet in the *Al-Adsani* case the court seemed to limit its proportionality test through an obscure reference to the *raison d'être* of the state immunity rule and its importance for the international community in general. According to the Court, the doctrine of state immunity pursues “the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty.”<sup>155</sup> As a result, instead of proceeding with a proper, in-depth test of proportionality, focusing on circumstances specific to the case, the ECtHR cursorily based its *dictum* on an implicit presumption that the general international law norm in question satisfied *in abstracto* the requirements of proportionality.<sup>156</sup> Thus, despite its explicit references to the Convention's special nature,<sup>157</sup> in reality, the court deliberately chose to uncritically subsume its own regime to general international law. Moreover, by accepting that the custom over state immunity did not “in principle . . . impos[e] a disproportionate restriction” on the conflicting right of the Convention and without proceeding any further with its usual

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154. The judgment was far from unanimous. Hierarchy of norms was precisely one of the points that gave rise to the most severe criticisms. See *id.* at 111–12 (Rozakis, J. & Caflisch, J., dissenting). But see GARDINER, *supra* note 38, at 288 (arguing that the conflicting norms in *Al-Adsani* are parallel, that is to say, of equal normative weight).

155. *Al-Adsani*, 2001–XI Eur. Ct. H.R. at 99.

156. *Id.* at 115 (Loucaides, J., dissenting) (arguing that any form of immunity which is applied without balancing the competing interests amounts to a disproportionate limitation of Article 6(1) of the ECHR).

157. *Id.* at 100.

proportionality test,<sup>158</sup> the court appears to have misused Article 31(3)(c), the application of which is meant to be limited simply to introducing relevant norms of international law, without either introducing presumptions concerning their value, nature, or effect, or authorizing the court to diverge from the judicial steps required by both its well-established practice and law.

Accordingly, even if one were to agree with the conclusions reached by the *Al-Adsani* judgment and its prioritization of state immunity over Article 6 of the ECHR, it is difficult to overlook its obvious defect in reasoning, which not only leads to an unjustified restriction in the sphere of application of Article 6 of the ECHR, but also reveals a clear tendency to use Article 31(3)(c) abusively as an ersatz substitute for the proportionality test. Significantly, the *Al-Adsani* judgment should not be seen as a model for the use of Article 31(3)(c) in conflicts of norms. Rather, the Article's intended function is limited to simply introducing the conflicting norms into judicial reasoning so that a judge may assess their effect.

It should come as no surprise then that the Court, which instrumentally or not failed to apply the proportionality test in the *Al-Adsani* judgment, later put this test fully into action in a case which concerned a conflict between the Convention's substantive norms and the provisions of a bilateral treaty negotiated between two states parties to the ECHR. To move, then, to the second scenario in which Article 31(3)(c) is used to address normative conflict, it is helpful to look at the *Slivenko* case.<sup>159</sup> In that case, the applicant was deported from Latvia under the terms of a bilateral treaty between Latvia and the Russian Federation providing for the withdrawal of the Russian army from Latvian territory. Under the terms of the treaty, Russian military personnel and all members of their families were subject to removal from Latvia. The court found that the consequent interference with the applicant's right to privacy of family life, protected under Article 8 of the ECHR, was in accordance with the law (the bilateral international treaty) and pursued a legitimate aim (protection of national security).<sup>160</sup> But this time the court proceeded with an in-depth test of proportionality<sup>161</sup> and concluded that the Latvian authorities, by perceiving the public interest in abstract terms and by not examining on a case-by-case basis "whether each person concerned presented a specific danger to national security or public order,"<sup>162</sup> "failed to strike a fair balance between the legitimate aim of the protection of

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158. *Id.*

159. *Slivenko v. Latvia*, 2003–X Eur. Ct. H.R. 229.

160. *Id.* at 263.

161. *Id.* at 263–67.

162. *Id.* at 266.



national security and the interest of the protection of the applicants' rights under Article 8."<sup>163</sup> Consequently, the respondent state was found to be in breach of its obligations under the Convention.<sup>164</sup>

On first impression, it seems that the ECtHR in its *Slivenko* judgment favored its own Convention. However, this is only partially true. The main aim of the ECtHR was to investigate the extent to which the two conflicting international treaties—the ECHR and the bilateral agreement between Latvia and Russia—could harmonically produce their respective, desired effects.<sup>165</sup> Given the obvious normative conflict between them, the court proceeded by examining whether the ECHR and, more specifically, Article 8, was susceptible to limitation so that necessary space could be created for the conflicting bilateral treaty to achieve its intended ends. Since Article 8 of the ECHR does not introduce any obligations of a *jus cogens* nature, it appears that it can be elastically limited in “accordance with law,” that is to say (in the present case) in accordance with the will of two member states that had bilaterally contracted to derogate from the Convention to allow withdrawal of the military personnel from one state to another. However, the *erga omnes partes* nature of Article 8 of the ECHR should be perceived not only as allowing derogations; it should also be perceived as giving priority to the effect of a norm that aims to collectively promote a value common within European public order. Hence, although at the macro level the right to family life may suffer limitations in order to promote a legitimate aim of public interest—in this particular case the protection of national security—at the micro level, limitations can only be accepted if and to the extent that they comply with the exigencies of proportionality which, in light of the particular circumstances of each individual case, balances the general interest with the private interest (rights) of human beings.

Therefore, a more direct, although provocative, way to describe the logic of the court in the *Slivenko* judgment would be to admit that it controls, by way of a proportionality assessment, the compatibility of conflicting international norms with the substantive provisions of its Convention, a regional quasi-constitution. Due to the latter's *erga omnes partes* quality, derogations are indeed allowed, but only to the extent legitimately justified by the facts of each particular case. As a consequence, the individual law-making *volonté* of states, as reflected by

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163. *Id.* at 267.

164. *Id.*

165. See Ineta Ziemele, *Case-Law of the European Court of Human Rights and Integrity of International Law*, in L'INFLUENCE DES SOURCES, *supra* note 13, at 205. However, Ziemele remains rather critical of the idea of directly recognizing the normative primacy of the ECHR's substantive provisions. *Id.* at 203.

bilateral or bilateralizable agreements introducing norms of *jus dispositivum*, can be valid only as long as this *volonté* does not introduce obligations that come into disproportionate conflict with the Convention, the provisions of which apparently enjoy a certain type of normative primacy, in the sense of elastic priority in their fulfillment.

The third and last hypothesis of conflict of norms to be discussed here is that of a conflict between the Convention and another international treaty which also introduces obligations of an *erga omnes partes* nature. In the *Jersild* case,<sup>166</sup> the applicant, a journalist, had been convicted by domestic courts for having conducted and broadcasted an interview with members of a racist group, as part of a documentary on the phenomenon of racism. The national authorities, seeking to comply with the 1965 U.N. International Convention on the Elimination of All Forms of Racial Discrimination, which requires states to fight racism through affirmative action, sentenced the applicant for having aided and abetted the dissemination of racist remarks. The court first underlined that a respondent state's obligations under the Convention "must be interpreted, to the extent possible, so as to be reconcilable with its obligations under the U.N. Convention."<sup>167</sup> However, in applying the proportionality test, the court paid particular attention to the fact that the applicant had neither made the objectionable statements himself nor intended to spread racist ideas; on the contrary, his objective was to raise public awareness over a sensitive issue of great public concern.<sup>168</sup> It concluded that by disproportionately interfering with the freedom of expression of the applicant, the domestic courts had breached their obligations under Article 10 of the ECHR.<sup>169</sup>

The first comment to make on the *dictum* of the court in the *Jersild* case is that the observations made previously regarding the *Slivenko* judgment remain relevant—the outcome suggests *prima facie* that the ECtHR favored its own regime. However, by investigating the legitimate limitations that the ECHR may (always in the light of the context of the case) accommodate, the court sought to reconcile the two regimes: it only concluded that Article 10 of the ECHR had been violated after having applied the proportionality test. Finally, although the normative force of both the external norms and the provisions of the Convention *in abstracto* remained intact, the facts of the case required that priority be given to only one of the two regimes. The fact that, in the end, the proportionality test favored the ECHR is exclusively the result of the

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166. See *Jersild v. Denmark*, 298 Eur. Ct. H.R. (ser. A) (1995).

167. *Id.* at 22–23.

168. *Id.* at 23–25.

169. *Id.* at 26.

particular circumstances of the case; should these have been different, so would the result have been.

What makes the *Jersild* case particularly notable is the court's application of the proportionality test in light of the fact that the two conflicting norms had the same normative nature or formal value (*erga omnes partes*). Exactly as in all other cases, the court balanced the conflicting material sources and set priorities in light of the circumstances particular to the case. Additionally, the circumstances of the *Jersild* case reveal that the substantive conflict did not arise between the ECHR and ICERD directly, but rather between the ECHR and the respondent state's practice developed to comply with the exigencies of the U.N. Convention. This explains why the *lex specialis maxim* is inappropriate: even where there appears *prima facie* to be a conflict between human rights norms, true normative conflicts *in abstracto*—that is, conflicts *per se*—between fundamental human rights are highly unlikely.<sup>170</sup>

### 3. Resort to (General) International Law for Questions Outside the ECHR's Subject Matter

The third scenario to be discussed in assessing the effectiveness of Article 31(3)(c) of the VCLT against normative fragmentation corresponds to cases in which the ECtHR must resort to general international law to address preliminary issues that fall outside the Convention's subject matter and do not find an answer within its "lacunary" text. That a special international regime must appeal to the broader international legal system to obtain answers to legal questions that are, in light of the circumstances of the case before it, a *conditio sine qua non* for it to operate, is proof that special regimes neither are self-contained nor can subsist effectively if entirely disconnected from their natural environment—that is, the international legal order.<sup>171</sup> Nevertheless, several of the examples below seek to prove that the ECtHR is far from disoriented by the false allures of self-contained regimes. On the contrary, its more recent case law contains several sound examples in which the court willingly aligned its *dicta* with prevailing trends within the international order (and especially with those emanating from the U.N. system), de-

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170. Concerning the typology of normative conflicts, see PAUWELYN, *supra* note 109, at 164–66, 175–78. According to the classification proposed by Pauwelyn, the conflict in *Jersild* should be defined as a "potential conflict in the applicable law." *Id.* at 176.

171. See Koskeniemi, *supra* note 11, at 17 ("Many of the new treaty-regimes in the fields of trade, environmental protection or human rights did have special rules for rule-creation, rule-application and change. This is what made them special after all. But when the rules run out, or regimes fail, then the institutions always refer back to the general law that appears to constitute the frame within which they exist.").

spite the fact that such a choice was not always free of cost for the Convention's *effet utile*.

The most interesting example with which to start is the *Loizidou* case, discussed in the introduction of this Article.<sup>172</sup> Although the court's decisions and judgments in *Loizidou* suggest that the anti-fragmentation function of systemic integration might be costless for the human rights teleology of the Convention, what is striking in *Loizidou* is that unity and fragmentation of international law are shown to co-exist. Thus, if the court's ultimate aim in silently diverging from ICJ precedent on reservations to international treaties<sup>173</sup> was to favor the ECHR's special object and purpose, this object and purpose was decidedly not an issue in a number of other instances in which avoidance of normative fragmentation over preliminary questions of international law either had no significant impact on the human rights effect of the Convention or was even a prerequisite for the court in order to exercise its jurisdiction.

Starting then from the first hypothesis, the ECtHR resorted in *Loizidou* to the broader international system for reasons relatively unrelated to the object and purpose of the Convention when deciding on the validity of the acts of the "Turkish Republic of Northern Cyprus" (TRNC). In this case, the applicant complained that Turkey had prevented her from peacefully enjoying her property in northern Cyprus, an area over which the government of Cyprus has exercised no effective control since a military intervention by Turkey in 1974 and the subsequent establishment of the TRNC.<sup>174</sup> In concluding that the TRNC was not regarded by the international community as a state under international law and, consequently, that its acts lacked validity, the court expressly applied Article 31(3)(c) of the VCLT and referred to relevant U.N. Security Council Resolutions.<sup>175</sup> By the same token, the court explicitly resorted to ICJ case law and, inspired by it, concluded that "international law recognises the legitimacy of certain legal arrangements and transactions . . . for instance as regards the registration of births, deaths and marriages, 'the effects of which can be ignored only to the detriment of the inhabitants of the [t]erritory.'" <sup>176</sup> Interestingly, the ECtHR achieved unity of international law thanks to its voluntary (and costless) openness to the interpretative authority of the ICJ case law.

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172. See *supra* note 6 and accompanying text.

173. For a collection of essays on the issue of reservations to human rights treaties, see *RESERVATIONS TO HUMAN RIGHTS TREATIES AND THE VIENNA CONVENTION REGIME: CONFLICT, HARMONY AND RECONCILIATION* (Ineta Ziemele ed., 2004).

174. *Loizidou v. Turkey*, 1996–VI Eur. Ct. H.R. 2216, 2221–22.

175. *Id.* at 2230–31.

176. *Id.* at 2231.

The *Loizidou* saga presents an extremely interesting example also with regard to the second scenario presented *supra*, namely when avoiding normative fragmentation over preliminary questions of international law is a prerequisite for the court to exercise its jurisdiction. Whether the court would exercise jurisdiction depended on how it answered another question of general international law, namely to whom the illicit conduct of the TRNC authorities should be attributed. Although its reasoning lacked the clarity one would expect from a judicial forum of its standing,<sup>177</sup> the court merged and answered in the affirmative both the questions of the attribution of the conduct of the TRNC to the respondent state and the extraterritorial jurisdiction of that state (and thereby the ECtHR itself).<sup>178</sup> Interestingly, rather than referring to relevant normative tendencies at the international level, the ECtHR chose to ground its reasoning on the teleology of the Convention. Hence, “[b]earing in mind the object and purpose of the Convention,” it concluded that “the responsibility of a Contracting Party may also arise when as a consequence of military action—whether lawful or unlawful—it exercises effective control of an area outside its national territory.”<sup>179</sup> Nevertheless, although the court seemed to neglect the systemic integration method of interpretation, in substance its reasoning did nothing more than contribute to the crystallization of the so-called doctrine of the *de facto* organ, as this was codified a few years later by ILC in Article 8 of its Norms on State Responsibility.<sup>180</sup>

Equally significant is the collateral effect generated by the systemic integration technique in the frame of another case, *Banković*,<sup>181</sup> which, despite its factual differences with the *Loizidou* case, similarly raised the question of the extraterritorial effect of the Convention. Although the

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177. See, e.g., *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. A) at 31 (1995) (decision on the preliminary objections).

178. *Id.* at 23–24.

179. *Id.* at 24.

180. *ILC Norms on State Responsibility*, *supra* note 74, art. 8 (“The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”). Interestingly, the interpretation of Article 8 of the ILC Norms on State Responsibility has opened a Pandora’s box of normative fragmentation in the international case law. In 1999, just a few years after the ECtHR *Loizidou* decision, the International Criminal Tribunal for the former Yugoslavia (ICTY) departed from the ICJ’s *Nicaragua* “effective control” test. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 64. The Tribunal introduced a less strict level of control in its *Tadić* judgment, described as “overall control.” *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment, ¶ 120 (July 15, 1999). The ICJ then answered with its recent *Genocide* case law, which criticized the ICTY’s test and insisted on its own *Nicaragua dictum*. *Application of Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.)* 2007 I.C.J. 1, 144–45 (Feb. 26).

181. *Banković v. Belgium*, 2001–XII Eur. Ct. H.R. 331.

court abstained in *Loizidou* from resorting to systemic integration, its objective was to establish jurisdiction on the basis of the effective extra-territorial control exercised by Turkey over the TRNC. By contrast, in *Banković* the ECtHR relied explicitly on Article 31(3)(c) to demonstrate that—with the exception of a handful of cases, including *Loizidou*, where extraterritorial jurisdiction applies—jurisdiction remains in principle territorial. However, by placing emphasis on the rule of territoriality in the exercise of jurisdiction, the court implicitly corroborated the “exception,” that is, its rather arbitrary artifice in *Loizidou* to silently isolate the criterion of effective control from the norms regulating the attribution of internationally wrongful acts and apply it as a criterion for the delimitation of jurisdiction.<sup>182</sup>

More specifically, in *Banković* the court based its reasoning mainly on two axes: the ordinary meaning of the term “jurisdiction”<sup>183</sup> and the intention of states as reflected both by their practice<sup>184</sup> and in the *travaux préparatoires*.<sup>185</sup> Interestingly, although this was not the first time that the systemic integration method was deprived of autonomous standing, it was the very first time that it was seen to operate as an auxiliary complement, not to the special object and purpose of the Convention but to state will. Hence, in order to conclude that “from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial,”<sup>186</sup> the court resorted to a (highly superficial) comparative analysis of a limited number of international human rights treaties<sup>187</sup> and mainly to the extensive citation of views expressed within legal scholarship.<sup>188</sup> Interestingly, the court relied on Article 31(3)(c) of the VCLT not to introduce into its reasoning relevant norms of international law but rather to refer to the “teachings of the most highly qualified publicists of

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182. See generally Vassilis Tzevelekos, *In Search of Alternative Solutions: Can the State of Origin Be Held Internationally Responsible for Investors' Human Rights Abuses that Are Not Attributable to It?*, 35 BROOK. J. INT'L L. 155 (2010). That article contends that the rules governing attribution are secondary state obligations that refer to state responsibility. By contrast, the concept of jurisdiction—both territorial and extraterritorial—stems from the framework of primary state obligations and serves as the basis for delimiting the sphere of competence. Therefore, the questions of attribution and extraterritoriality are regulated by different bodies of law and should have been treated by the ECtHR separately. *Id.*

183. *Id.* at 351–54; see also ECHR, *supra* note 3, art. 1 (“The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”).

184. *Banković*, 2001–XII Eur. Ct. H.R. at 352.

185. *Id.* at 353.

186. *Id.* at 351.

187. *Banković v. Belgium*, 2001–XII Eur. Ct. H.R. 331, 357–58.

188. *Id.* at 351–52.

the various nations.”<sup>189</sup> Apparently, in addition to establishing that it was not the state’s *volonté* to diverge from the ordinary meaning of the term “jurisdiction,” the court was mainly attempting to justify its own “*volonté*” to abstain artfully from exercising jurisdiction over an extremely technical and highly politicized case.<sup>190</sup>

Moving to another example, the court has been equally constrained to resort to general international law in order to decide on delicate questions of state responsibility that are not regulated by its own incomplete special regime. Turning to the emblematic work of the ILC, the court concluded in *Ilaşcu*<sup>191</sup> that “[a] State may . . . be held responsible even where its agents are acting *ultra vires* or contrary to instructions.”<sup>192</sup> By the same token:

A wrongful act may be described as continuing if it extends over the entire period during which the relevant conduct continues and remains at variance with the international obligation . . . .

. . . [I]n the case of a series of wrongful acts or omissions, the breach extends over the entire period starting with the first of the acts and continuing for as long as the acts or omissions are repeated and remain at variance with the international obligation concerned . . . .<sup>193</sup>

The ECHR, like every other international treaty, introduces legal obligations that, when breached, entail a number of secondary international responsibility obligations owed by the state to which the wrongful conduct is attributed. Despite its specialized subject matter and the consequently unavoidable deficient format of its text, the drafters of the Convention opted to expressly regulate certain issues related to the secondary obligations of states that violate the Convention’s substantive provisions. Article 41 of the ECHR, for instance, refers to the obligation of states to offer “just” satisfaction to the victim of a human rights violation. Clearly, this obligation corresponds to Articles 31 and 34 of the ILC Norms on State Responsibility,<sup>194</sup> which require that a certain form of

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189. Statute of the International Court of Justice art. 38(1)(d), June 26, 1945, 59 Stat. 1055, 3 Bevans 1179. Article 38 of the ICJ Statute attributes to legal scholarship the status of secondary source of international law.

190. The case concerned the international responsibility of the member states of the North Atlantic Treaty Organization (NATO) for human rights violations allegedly committed in the course of the humanitarian military intervention in the former Yugoslavia. See *Banković*, 2001–XII Eur. Ct. H.R. at 340–41.

191. *Ilaşcu v. Moldova*, 2004–VII Eur. Ct. H.R. 1.

192. *Id.* at 264.

193. *Id.*

194. See *ILC Norms on State Responsibility*, *supra* note 74, art. 31 (“The responsible State is under an obligation to make full reparation for the injury caused by the internationally

reparation be made available to the victim. In this example, Article 41 of the ECHR constitutes *lex specialis*.<sup>195</sup> Yet, as it is all too easy to imagine, not all questions about the extent, nature, and modalities of the secondary obligations of ECHR states parties could have been regulated by its text. Nevertheless, there are a number of secondary international obligations that—although not explicitly provided in it—are inherent to the special nature of an *instrumentum* aimed at protecting human rights. For example, it would be inconceivable for a human rights treaty to provide only for the pecuniary satisfaction of the victim without requiring an immediate cessation of the wrongful act and guarantee of non-repetition.<sup>196</sup>

If, finally, one takes into account the fact that the ECHR is silent as to some of the most fundamental aspects of state responsibility, then it comes as no surprise that it also does not regulate the extremely thorny question of the responsibility of its states parties for human rights violations committed by international organizations of which they are members.<sup>197</sup> Although in the *Banković* case the ECtHR skillfully avoided shedding light on this issue by playing the “extraterritoriality game,” in the *Behrami & Saramati* case,<sup>198</sup> answering this very same question was a prerequisite for the establishment of jurisdiction—or rather, as will be explained below, for avoiding the exercise of jurisdiction. This extremely complex case is very important for this study for many reasons. First, like all the other cases included in this section, it demonstrates how it is essential for the court to turn to general international law in order to deal with preliminary questions that fall outside the subject matter of the

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wrongful act. . . . Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.”); *id.* art. 34 (“Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.”).

195. Thus, the reparation in the ECHR regime takes the form of a “just” satisfaction. Moreover, according to Article 41 of the ECHR, just satisfaction is to be given “if the internal law of the High Contracting Party concerned allows only partial reparation to be made.” ECHR, *supra* note 3, art. 41.

196. See *ILC Norms on State Responsibility*, *supra* note 74, art. 30 (“The State responsible for the internationally wrongful act is under an obligation: (a) To cease that act, if it is continuing; (b) To offer appropriate assurances and guarantees of non-repetition, if circumstances so require.”). The obligations to cease and not to repeat the illicit act are seen to form an inherent part of the so-called substantive effect of the final judgments of the ECtHR, that is, the obligation upon states not only to execute, but, more broadly, to comply with the judgments of the Court. See ECHR, *supra* note 3, art. 46(1); see, e.g., Gérard Cohen-Jonathan, *Quelques considérations sur l'autorité des arrêts de la Cour européenne des Droits de l'Homme*, in MARC-ANDRÉ EISSEN, *LIBER AMICORUM* 39, 49–50 (1995).

197. This scenario is to be distinguished from one in which an ECHR state party breaches its obligations under the Convention in order to comply with conflicting international obligations originating from its membership in another international organization.

198. See *Behrami v. France & Saramati v. France, Germany, & Norway*, App. Nos. 71412/01 & 78166/01 (Eur. Ct. H.R. May 2, 2007) (decision as to the admissibility).



Convention. Second, the *Behrami* case serves as proof of the fact that, even when the court was “forced” to apply the systemic integration technique to questions not regulated by its own regime, its selectiveness remained intact. The court simply “shifted” from selectiveness in the choice of preferable methods of interpretation to selectiveness in the determination of which relevant norms of international law will be used as the basis of its *dictum*. Clearly, reliance upon certain norms implies silent exclusion of others that apparently do not favor the desired judicial outcome. Third, in the *Behrami* case, the court comprehensively applied the systemic integration method of interpretation of Article 31(3)(c) and in so doing explicitly recalled the potential that this technique offers<sup>199</sup> in resolving at least three different issues: (1) the nature and legal status under international law of the international actors operating in the territory where the alleged violations took place; (2) the genesis, nature, and extent of the respective competences of these actors; and, (3) the more complex question of the attribution of the alleged violations.

The applicants in *Behrami* alleged that their relative’s death and injuries had been caused by the failure of the French Kosovo Force (KFOR) troops to mark and/or defuse the un-detonated cluster bombs which KFOR had known to be present. KFOR was defined by the court as an international security force, performing its tasks under the effective control of the North Atlantic Treaty Organization (NATO).<sup>200</sup> While acting under Chapter VII of the Charter, the U.N. Security Council delegated the power to establish an international security presence over the territory of Kosovo to the subjects co-forming KFOR.<sup>201</sup> KFOR’s involvement was described in terms of a “service provider” whose personnel acted on behalf of the United Nations’ Interim Administration of Kosovo (UNMIK).<sup>202</sup> UNMIK was conceived as a U.N. subsidiary organ to which the Security Council delegated, always under Chapter VII of the U.N. Charter, the power to administer Kosovo.<sup>203</sup> Its actions or omissions were directly attributable to the United Nations itself.<sup>204</sup>

The case of the second applicant, however, was different. The applicant in *Saramati* complained about his detention by KFOR and, therefore, his allegations concerned responsibilities that fell directly under the security mandate of KFOR.<sup>205</sup> As far as the question of the

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199. *Id.* ¶ 122.

200. *Id.* ¶¶ 114, 70.

201. *Id.* ¶ 129.

202. *Id.* ¶ 125.

203. *Id.* ¶ 129.

204. *Behrami v. France & Saramati v. France, Germany, & Norway*, App. Nos. 71412/01 & 78166/01, at ¶ 129 (Eur. Ct. H.R. May 2, 2007) (decision as to the admissibility).

205. *Id.* ¶ 126.

attribution of the conduct of KFOR's military personnel was concerned, the court structured its reasoning around the argument of a virtual, multi-level pyramid of control, at the peak of which it placed the Security Council. The argument was constructed in two stages.

First, the court attributed the alleged misconduct to NATO through the theory of effective control. Looking to Article 5 of the ILC's Draft Norms on the Responsibility of International Organizations,<sup>206</sup> the court concluded NATO exercised sufficient effective control over the military actions through its effective, hierarchical chain of command, even though NATO's command over operational matters was not exclusive.<sup>207</sup> Second, the court relied on the doctrine of delegation of powers. This time through Article 31(3)(c) the court considered not only the relevant Security Council resolutions that delegated powers to NATO, but also relevant studies by legal scholars that confirmed the court's understanding of the nature of the delegation of powers.<sup>208</sup> Consequently, according to the ECtHR, despite NATO's effective control over the conduct in question, the Security Council remained at the top of the pyramid as the institution maintaining "ultimate authority and control" over the former.<sup>209</sup> "In such circumstances, the Court observe[d] that KFOR was exercising lawfully delegated Chapter VII powers of the [U.N. Security Council] so that the impugned action was, in principle, 'attributable' to the [United Nations] . . . ."<sup>210</sup> Therefore, the court concluded, the alleged violations were properly attributed to a subject of international law different than the respondent states, and thus did not come under the ECtHR's competence *ratione personae*.<sup>211</sup>

It is essential to note at this point of the analysis that in naming the Security Council as the primary, ultimate, and exclusive subject of law to which the alleged breaches of the ECHR would be attributed, the court relied upon a rather academic and highly abstract argument which, although in complete harmony with the doctrinal schemes proposed by a number of authors,<sup>212</sup> still had little to do with the primary task of a

206. *Id.* ¶¶ 30–31 (citing ILC, *Responsibility of International Organizations: Titles and Texts of the Draft Articles 4, 5, 6, and 7 Adopted by the Drafting Committee*, art. 5, U.N. Doc. A/CN.4/L.648 (May 27, 2004) ("The conduct of an organ of a State . . . that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.")).

207. *Behrami v. France & Saramati v. France, Germany, & Norway*, App. Nos. 71412/01 & 78166/01, ¶¶ 135–41 (Eur. Ct. H.R. May 2, 2007) (decision as to the admissibility).

208. *See id.* ¶¶ 129–31.

209. *Id.* ¶ 134.

210. *Id.* ¶ 141.

211. *Id.* ¶¶ 141–52.

212. Although the court claimed to use the terms "authorise" and "delegate" interchangeably, *id.* at 43, it actually silently applied the "delegation of powers" theory, *see id.*

judicial organ, namely the pursuit of justice based on the facts specific to the case before it. To be more explicit, aside from confirming whether behavior like that in the *Behrami* case was “in principle, ‘attributable’ to the UN,”<sup>213</sup> the ECtHR’s role was to investigate whether the particular facts of the case before it verified this general rule of attributability to the United Nations. Yet, even if the outcome of such a fact-based test had ratified the thesis advanced by the court,<sup>214</sup> it is difficult to imagine what would have stopped it from applying the systemic integration technique one last time in order to resort to former Article 28(1) of the ILC Draft Norms on the Responsibility of International Organizations.<sup>215</sup> Article 28(1) would have explicitly authorized the court to pierce the institutional veil of international organizations in order to hold member states responsible for the alleged wrongful conduct.<sup>216</sup> That explained, it becomes evident that selectiveness in judicial reasoning is thus extended far beyond a simple choice of the preferable methods of interpretation: the court enjoyed an equally wide margin of discretion in the selection of the relevant normative elements to which it referred.

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¶¶ 133–36. For a discussion of this theory, see DANESH SAROOSHI, *THE UNITED NATIONS AND THE DEVELOPMENT OF COLLECTIVE SECURITY: THE DELEGATION BY THE UN SECURITY COUNCIL OF ITS CHAPTER VII POWERS* 163–66 (1999). By adopting this theory, the court tacitly rejected the theory of “authorization,” which emphasizes the dual nature, both institutional and decentralized, of operations like that of KFOR. At the decentralized level, the wrongful conduct could have been directly attributable to the member states. See LINOS-ALEXANDRE SICILIANOS, *I EXOUSIODOTISI TOU SYMBOULIOU ASFALEIAS TOU OHE GIA CHRISIVIAS* [AUTHORIZATION BY THE UN SECURITY COUNCIL TO USE FORCE] 168 *et seq.* (2003); Linos-Alexandre Sicilianos, *Entre multilatéralisme et unilatéralisme: l’autorisation par le Conseil de sécurité de recourir à la force*, 339 *RECUEIL DES COURS DE L’ACADEMIE DE DROIT INTERNATIONAL* 109 *et seq.* (2008).

213. *Behrami v. France & Saramati v. France, Germany, & Norway*, App. Nos. 71412/01 & 78166/01 ¶ 141 (Eur. Ct. H.R. May 2, 2007) (decision as to the admissibility).

214. See, for example, the critical comments by Paolo Palchetti, *Azioni di forze istituite o autorizzate delle Nazioni Unite davanti alla Corte europea dei diritti dell’uomo: I casi Behrami e Seramati*, 90 *RIVISTA DI DIRITTO INTERNAZIONALE* 681 (2007) (concluding that the Security Council did not, in practice, exercise overall control over the forces participating in KFOR).

215. ILC, *Responsibility of International Organizations: Titles and Texts of the Draft Articles Adopted by the Drafting Committee on 31 May 2006: Addendum*, art. 28, U.N. Doc. A/CN.4/L.687/Add.1 (July 19, 2006) (“A State member of an international organization incurs international responsibility if it circumvents one of its international obligations by providing the organization with competence in relation to that obligation, and the organization commits an act that, if committed by that State, would have constituted a breach of that obligation.”). Interestingly, the examples cited by ILC in its explanatory report are all taken from the case law of the ECtHR. See ILC, *Report of the Fifty-Eighth Session*, U.N. GAOR, 61st Sess. Supp. No. 1, at 283–86, U.N. Doc. A/61/10 (2006).

216. See Manolis Ioannou, *I ypóthesi Behrami-Saramati sto EDDA kai to adoxo telos tis* [The Behrami-Saramati Case Before the ECtHR and Its Inglorious End], 2 *EFARMOGES DIMOSIOU DIKAIΟΥ* 478 (2008).

In the *Behrami* case, however, it is obvious that the court did not wish to leave any room for misinterpretation of its intentions. Thus, although it did not explicitly name Article 28(1), it openly confirmed its power to examine on the merits allegations of wrongful conduct arising from its states parties' participation in other international organizations—especially when, within these organizations, the standards of protection of the Convention's rights were proven to be “manifestly deficient.”<sup>217</sup> Having stated this, the court went on to explain why, in the light of the circumstances of the *Behrami* case, piercing the institutional veil of the organization to which the allegedly wrongful conduct was attributable had not been an option: the fact central to its reluctance to exercise jurisdiction effectively was the “imperative nature”<sup>218</sup> of the peace and security objectives entrusted by the international community to the Security Council. If the court were to exercise jurisdiction, the effect of the ECtHR would have been to interfere with state conduct under Chapter VII U.N. Security Council resolutions.<sup>219</sup> Moreover, if the ECtHR were to exercise indirect control over the Security Council via the common member states of the two respective international organizations, its practice would have come into conflict with Articles 25 and 103 of the U.N. Charter.<sup>220</sup> Thus while systemic integration arm of the *Behrami* case contained one last bullet, the court chose not to use it in order to favor the human rights *telos* of its Convention (as it usually does). Instead it applied systemic integration to justify a foregone conclusion of judicial self-restraint.

To be fair to the Strasbourg Court, it has to be admitted that it did no more than follow the tempo set by the ICJ.<sup>221</sup> Certainly, giving priority to systemic orthodoxy does not come free of cost. The green light it appears to have given the Security Council, and the promise for everlasting immunity, constitute a costly surrender of its own power, detrimental to its very *raison d'être* (the effective protection of human rights). Although it would be easy for a skillful court like the ECtHR to point its finger at the maestro, that is, the ICJ, a judge of Strasbourg is undoubtedly aware that the systemic symphony to which she submits so eagerly does not necessarily guarantee a satisfactory acoustic outcome. If the essence of the unity of international law is the avoidance of fragmentation at any

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217. *Behrami v. France; Saramati v. France*, App. Nos. 71412/01 & 78166/01 ¶ 145 (Eur. Ct. H.R. May 2, 2007) (decision as to the admissibility).

218. *Id.* ¶ 148; *see also id.* ¶ 149.

219. *Id.*

220. *Id.* ¶¶ 27, 147 (citing Questions of Interpretation and Application of 1971 Montreal Convention Arising from Aerial Incident at Lockerbie (Libya v. U.K.), 1992 I.C.J. 3 (Apr. 14) (declining, in a famous decision, to review the Security Council acts)).

221. *See Lockerbie*, 1992 I.C.J. 3 (Apr. 14).

price, then the use of the systemic integration technique in the *Behrami* case can be evaluated as successful. But what makes the application of Article 31(3)(c) in *Behrami* a success story is not so much the aptitude of systemic integration to bridge normative elements that are formally disconnected. On the contrary, this effectiveness seems to result from the Strasbourg judge's cognizance that her very own judicial forum is part of a broader, pluralistic, institutional architecture—the de facto rules of which she is “obligated” to submit to. In substance, then, the *Behrami* decision primarily emphasizes the institutional rather than the normative dimension of integration. Moreover, as the next section will briefly show, this is not the first time that this technique has been placed at the service of the institutional idiomorphic economy of the international system.

### B. Institutional Aspects: Abuse of the Systemic Integration Technique?

In contrast with *normative* fragmentation, discussed in Part III.A above, the prevailing characteristic of the judicial dimension of *institutional* fragmentation is incoherence in judgments delivered by institutionally disconnected international judicial fora ruling over formally distinct cases, which, although founded on different legal bases, present common, or at least similar facts and, in certain instances, even common parties. Arguably, the ECtHR's judgment in *Bosphorus*<sup>222</sup> constitutes an exemplary piece of judicial diplomacy in which the court avoided threatening both the institutional and normative unity of international law, through its *sui generis* application of the systemic integration technique. While *Bosphorus* provides important inspiration to judicial institutions seeking to avoid bringing the stigma of devastating international systemic harmony upon their heads, as other ECtHR case law demonstrates, there are also alternative, equally effective, and less pre-tentious and activist ways for a forum to serve unity.<sup>223</sup> Nevertheless, the

222. *Bosphorus v. Ireland*, 2005–VI Eur. Ct. H.R. 107.

223. See, for example, the so-called *Norwegian Religious Education Cases*, in which the applicants, after being divided into two groups so as to avoid the *lis pendens* barrier, brought their common case simultaneously before two different fora (the U.N. Human Rights Committee (HRC) and the ECtHR). Both institutions declared the cases admissible, examined them on the merits, and delivered converging *dicta*. Hum. Rts. Comm'n [HRC], *Views: Comm. No. 1155/200*, U.N. Doc. CCPR/C/82/D/1155/2003 (Nov. 23, 2004); *Folgerø v. Norway*, 46 Eur. H.R. Rep. 1147 (2008). The ECtHR, which was the second jurisdiction to decide the case on the merits, limited its reference to the HRC's decision to a simple, but verbatim, reproduction of the reasoning reported in its facts section. *Id.* at 1166–69. However, Strasbourg avoided making further reference to HRC's *dictum* and proceeded with its own, autonomous analysis on the basis of the ECHR. While remaining faithful to their traditional reasoning methodologies, the two fora reached converging conclusions. See Lucas Lixinski, *Choice of Forum in International Human Rights Adjudication and the Unity/Fragmentation Debate: Is Plurality the Way Forward?*, 2008 ITALIAN Y.B. INT'L L. 183.

court's reasoning in *Bosphorus* is of particular importance to this study because of the imaginative role it assigned to Article 31(3)(c) in combating fragmentation.

The facts of the case are as follows: the applicant corporation brought a complaint against Ireland alleging that Ireland had violated its right to property when it impounded its assets—namely two aircrafts leased from the national airline of former Yugoslavia.<sup>224</sup> Interestingly, the reason the respondent state had interfered with the applicant's right to property was in an effort to comply with a European Community (E.C.) law,<sup>225</sup> which in turn was adopted in execution of a Security Council resolution imposing sanctions on the former Yugoslavia following its armed conflict.<sup>226</sup> Failure to honor its Community law obligations would have caused Ireland to apply conditionality in implementation of its E.C. and U.N. obligations, in the name of human rights. Faced with this dilemma, the Supreme Court of Ireland referred the *Bosphorus* case to the European Court of Justice (ECJ) for a preliminary ruling.<sup>227</sup> After concluding that the Irish authorities had appropriately applied the E.C. regulation at issue (in impounding the former Yugoslavian property), the ECJ proceeded to balance the right to property against the general interest behind the regulation. In its proportionality analysis, the ECJ pointed to the importance of proper implementation of the Security Council resolutions, which sought to bring an end to the ongoing conflict in the former Yugoslavia and to restore peace and security. The court concluded that, given the importance of these objectives, interference with the applicant corporation's right to property was not disproportionate.<sup>228</sup>

Having received no relief at domestic level, the applicant next turned to Strasbourg. The starting point of the ECtHR was to qualify the conduct of the respondent government as "a control of the use of the [applicant's] property,"<sup>229</sup> which the court concluded under the facts of the case did not amount to an expropriation. Rather, the court determined, the conduct of the Irish authorities fell under the second paragraph of Article 1 of the 1<sup>st</sup> Protocol of the Convention, which recognizes that states are entitled to control the use of property *in accordance with the general interest*.<sup>230</sup> Maintaining its usual line of reasoning, the court next questioned whether there existed a legal basis allowing interference into the applicant's right. In so doing, it defined the

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224. *Bosphorus*, 2005–VI Eur. Ct. H.R. at 115–19.

225. *Id.* at 126–30.

226. *Id.*

227. Case C–84/95, *Bosphorus v. Minister for Transport*, 1996 E.C.R. I–03953.

228. *Id.* at I–3975 to I–3977.

229. *Bosphorus v. Ireland*, 2005–VI Eur. Ct. H.R. 107, 152–53.

230. *Id.*

duty of the Irish Government to comply with its obligations flowing from the E.C. legal order.<sup>231</sup>

Traditionally, the final step in the Court's reasoning in similar cases is the application of the proportionality test. However, while the ECtHR proceeded explicitly with just such a proportionality test, instead of focusing—as the ECJ had—on the essence of the general interest underlying both the Security Council resolution and the consequent E.C. regulation, the ECtHR looked explicitly toward the systemic integration method of interpretation, recognizing “the growing importance of international co-operation and of the consequent need to secure the proper functioning of international organisations.”<sup>232</sup> The court concluded that the respondent state's interference with the applicants' property in compliance with its obligations under E.C. law constituted “a legitimate general-interest objective within the meaning of Article 1 of Protocol No. 1.”<sup>233</sup>

What the court did not make clear in its judgment is whether, beyond the rather general and superficial reference it made to the maxim *pacta sunt servanda*, it also considered that “international cooperation” and the “proper functioning of international organisations” are general international law obligations for states.<sup>234</sup> The above analysis of ECtHR case law has demonstrated that the court understands the reference within Article 31(3)(c) to “relevant rules of international law” to cover a remarkably ample range of normative elements (such as soft and hard law instruments, international custom, international case law, and even legal scholarship). However, the surprising element of *Bosphorus* is that the reason the court resorted to systemic integration was not to introduce any of these normative sources of international law but rather was based upon an exceptional sort of international necessity—that is, the “need” to secure the proper functioning of the E.C. legal order.<sup>235</sup> The language of the judgment clearly points towards a strong interrelation between Article 31(3)(c) and the fulfillment of this “need.” In its reference to Article 31(3)(c), the ECtHR defined the need for the respondent state to respect its international obligations *vis-à-vis* a third international organization (namely the E.C.) as the legitimate counterbalance to the applicant's right to property—and not the general interest objective that correspond to the *raison d'être*, or rather, the material source of the obligations emanating from that organization. In other words, through systemic integration, the court silently incorporated the general interest

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231. *Id.* at 153–56.

232. *Id.* at 156 (citations omitted); *see also id.* at 156–59.

233. *Id.* at 157 (citation omitted).

234. *Id.* at 156.

235. *Bosphorus v. Ireland*, 2005–VI Eur. Ct. H.R. 107, 156.

defined by the ECJ (namely, the protection of international peace and security) into its concerns about institutional overlap and harmonious compliance with conflicting international legal obligations. Hence, instead of limiting the use of Article 31(3)(c) to its classic normative function in a typical conflict of norms between the Convention and the E.C. regulation or the Security Council resolution, the court opted to widen the spectrum of systemic integration so that the latter also depicted the institutional dimensions of the problem. Doing so inevitably caused the central question to change: rather than targeting harmonization or setting priorities among the effects of two conflicting international norms, the court focused on coordinating the practice of two different judicial fora, which although corresponding to distinct regimes rule on a common question introduced by a single case.

Nonetheless, the ECtHR's decision to abstain from exercising indirect control of compatibility between the ECHR and the relevant E.C. law entails certain consequences. By dislocating general interest and examining it through the distorting lens of institutional coordination, the ECtHR deprived itself of the possibility of proceeding with a test of proportionality analogous to that exercised by the ECJ. In addition, the ECtHR also clearly undermined the soundness of its own test. Due to the institutional orientation introduced by systemic integration, the proportionality test—in the course of the analysis—was converted into an *in abstracto* test of “equivalent protection.” Much like in *Al-Adsani*, the court seems to have abused Article 31(3)(c) in order to escape reasoning over proportionality.<sup>236</sup>

Instead, the question raised by the court as the basis for its analysis was “whether, and if so to what extent, that important general interest of compliance with [E.C.] obligations [could] justify the impugned interference by the Irish State with the applicant company's property rights.”<sup>237</sup> Although states are generally free to transfer sovereign power to international organizations, they remain responsible for any breach of the Convention, even if the breach occurs when acting in compliance with conflicting international obligations stemming from these organizations.<sup>238</sup> Nonetheless, “[i]n the Court's view, State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to [be] protect[ing] fundamental rights . . . in a manner which can be considered at least equivalent to that for which the Convention provides.”<sup>239</sup> Thus, the court allowed a shift from the proportionality test to an

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236. See Part III.A (discussing *Al-Adsani*).

237. *Bosphorus v. Ireland*, 2005–VI Eur. Ct. H.R. 107, 157.

238. *Id.*

239. *Id.* at 158 (internal citation omitted).



equivalent protection test. It concluded that there was no violation of the Convention after justifying why the protection of human rights in the E.C. order was, in principle, equivalent to that of its own regime.<sup>240</sup>

Thus by endorsing the *dictum* of their ECJ colleagues, the ECtHR yielded once again to the logic of institutional systemic integration, exactly as it had in *Behrami*. However, this time the court did not do so *carte blanche*, but rather left open an important escape clause:

[The presumption that the EC offers a protection of human rights equivalent to the level of the ECHR may] be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international cooperation would be outweighed by the Convention's role as a "constitutional instrument of European public order" in the field of human rights.<sup>241</sup>

The ECtHR appears to be a courteous specialized forum respectful of international systemic order. The utilization in *Bosphorus* of systemic integration in service of judicial comity<sup>242</sup> proves this very clearly. Never-

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240. *Id.* at 159–61.

241. *Id.* at 158. Indeed, the ECtHR has reviewed already the compatibility of the Union law with the ECHR. In *Matthews v. United Kingdom*, the ECtHR found that exclusion of the people of Gibraltar from the elections for the European Parliament constituted a violation of the ECHR. *See Matthews v. United Kingdom*, 1999–I Eur. Ct. H.R. 251, 265–66, 272–73. However, the conflict with the Convention's provisions in *Matthews* concerned E.C. primary law, not secondary, as in *Bosphorus*. The ECtHR had a second opportunity to review indirectly the E.C. legal order in the *Senator Lines* case. There, the applicant corporation, on which the European Commission had imposed a fine for having breached E.C. competition rules, brought a complaint before the ECtHR alleging violation of its right of access to justice. *See Senator Lines GmbH v. Fifteen Member States of the European Union*, 2004–IV Eur. Ct. H.R. 331, 333. However, the ECtHR did not examine the case on the merits, since, by the time of its decision as to the admissibility, the issue had been resolved at the E.C. level and the case was moot. *Id.* at 345; *see also* Gérard Cohen-Jonathan & Jean-François Flauss, *Cour européenne des droits de l'homme et droit international général*, 94 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 778, 791–96 (2004). *See generally* Sionaidh Douglas-Scott, *A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis*, 43 COMMON MKT. L. REV. 629, 640–55 (2006) (discussing the informal dialogue developed between the two courts).

242. On the definition of comity, *see, for example*, Andrea Gattini, *Un Regard Procédural sur la Fragmentation du Droit International*, 110 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 303, 323–24 (2006). *See also* Nikolaos Lavranos, *Regulating Competing Jurisdictions Among International Courts and Jurisdictions*, 68 HEIDELBERG J. INT'L L. 575, 605 (2008) (qualifying the ECtHR *Bosphorus* judgment as an act of comity towards the ECJ). However, it is important to emphasize that, since the comity technique so far has only occasionally been practiced at the international level, it still lacks any international binding effect. Despite the efforts of legal scholarship to equip it with the force of positive law, general international law does not contain any norm obliging a forum to abstain from exercising its jurisdiction in favor of another court. This silence in positive law leaves ample room for judicial discretion as to how and when to apply comity. This is why comity can better be understood in the light of the theory of legal pluralism. *Contra* Ernst-Ulrich Petersmann,

theless, the court expects the same from other institutional players, at least within the European subsystem, where it assumes the role of a quasi-constitutional forum entrusted with the interpretation of an instrument whose provisions establish a regional public order.<sup>243</sup>

A pragmatic evaluation of the *Bosphorus* judgment requires that a final, important parameter be taken into consideration. As explained previously, the E.C. legislation in question was adopted in execution of a Security Council resolution that imposed sanctions under Chapter VII of the U.N. Charter. By challenging the legality of the E.C. regulation, the ECHR would inevitably (albeit indirectly) have had to have reviewed the Security Council's resolution—a role the ECtHR categorically rejected in *Behrami*. Thus while ECtHR is clearly a courteous international institution, it remains blurred within *Bosphorus* as to which institution it really addresses this courtesy. Quite often, appearances are said to be deceptive—and indeed the *Bosphorus* judgment would seem to confirm this rule.

#### CONCLUDING REMARKS: ATTEMPTING A SYNTHESIS

Can Article 31(3)(c) of the VCLT serve effectively as an anti-fragmentation tool in the hands of an international judge? The case law of an international judicial forum entrusted with the interpretation of a “special” instrument designed for the promotion of regional integration by means of human rights, democracy, and the rule of law suggests that the mission assigned to the Article 31(3)(c) can take at least four different forms.

When, first, the relevant rules of international law are complementary to the ECHR, ECtHR case law shows that these rules can be effectively absorbed by the Convention, with an expanding effect on its text. In this case, systemic integration works in substance as a complement to the special object and purpose of the Convention. In this capacity, Article 31(3)(c) allows ECtHR judges to open their regime to the broader international system and selectively collect normative materials (both mature and “softer” ones, based on the relevant practice of states, international organizations, and international judicial fora),

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*Multilevel Judicial Governance of International Trade Requires a Common Conception of Rule of Law and Justice*, 10 J. INT'L ECON. L. 529 (2007) (contending that judicial institutions are committed to pursue justice in the frame of a common objective understanding of the concept of the rule of law).

243. As Judge Ress argues in his concurring opinion in *Bosphorus*, Article 31(3)(c) “cannot be interpreted to give treaties concluded between the Contracting Parties precedence over the Convention.” *Bosphorus v. Ireland*, 2005–VI Eur. Ct. H.R. 107, 170 (Ress, J., concurring).

enriching the incomplete text of the Convention and, thereby, broadening the semantic field of its provisions in a way that provides greater human rights protection but that can also easily extend further than or against state will. In this first scenario, the effect of Article 31(3)(c) is to reinforce the Convention's special *telos*. Whether this reinforcement leads towards the uniformity of international law or works as a potential source of fragmentation depends on the degree of maturity of the relevant sources of international law incorporated into the Convention. However, even if the ECHR regime is proven to move faster than the prevailing tempo within the broader system and therefore to diverge—at least temporarily—from it, there is still nothing to prohibit a regional sub-system from introducing higher standards of protection for human rights. When norms are complementary, true normative fragmentation is highly unlikely to occur. This is because the international system can easily accommodate multiple schemas of human rights protection, and fragmentation will occur only when standards of protection adopted by one regime are unduly lower than or divergent from those prevailing at the universal level. This definitely is not occurring at the ECtHR.

If, on the contrary, there is a conflict between the relevant norms of international law and the ECHR, the systemic integration method of interpretation comes into play *ipso facto*. Although this scenario is by far the most important in which Article 31(3)(c) can act as a counterweight to fragmentation, analysis of the case law demonstrates that systemic integration cannot (and should not) provide more than a simple “point of contact” between conflicting norms. Beyond this basic function, there is little, if any, room at all for systemic integration to effectively promote the unity of international law.<sup>244</sup> Rather, it resigns this role to classic and well-known techniques used to resolve conflict of norms problems. Next to these, special tribute must be paid to the role of the proportionality

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244. As Nele Matz-Lück suggests:

[Article 31(3)(c)] is a viable principle for several tasks: filling gaps left by a treaty, clarifying unclear terms and generally safeguarding that terms used in a similar context are understood in a similar way. However, the viability of this specific kind of interpretation as a conflict-solution tool is less obvious. Systemic integration may fail if it is the system that is in many ways incoherent.

Matz-Lück, *supra* note 29, at 50; see also Benn McGrady, *Fragmentation of International Law or “Systemic Integration” of Treaty Regimes: EC Biotech Products and the Proper Interpretation of Article 31(3)(c) of the Vienna Convention on the Law of Treaties*, 42 J. WORLD TRADE 589, 607 (2008) (“Article 31(3)(c) only applies . . . to situations where two treaty obligations are capable of being read together. That is, Article 31(3)(c) applies where those obligations are not in ‘conflict’ with one another. As such, an extraneous treaty cannot be applied by a decision maker and cannot modify the applicability of the treaty under interpretation. Rather, the role of the extraneous treaty is to cast light upon the question of how the obligations set out in the treaty under interpretation are to be applied.”) (citation omitted).

assessment: given the *erga omnes partes* nature of the ECHR's substantive provisions, proportionality is an unparalleled tool to help ECtHR judges balance the human rights *telos* of the Convention against conflicting norms of international law and the general interest objectives these norms pursue. The aim of the proportionality tool is simply to set *ad hoc* priorities among normative effects, without affecting the normative force of the conflicting norms.

The third use of systemic integration arises when the ECtHR resorts to general international law to fill a "*lacuna*" in the ECHR regime, without which the ECHR could not achieve its *effet utile*. Given the specificity of the Convention's subject matter, the case law demonstrates that this scenario occurs frequently. Judges often have no choice but to resort to general international law for answers that will 'unlock' the effect of the Convention. In most instances, the court uses systemic integration to legitimately give effect to the Convention's *telos*. Nonetheless, it would come as no surprise if, due to the special nature of its *instrumentum*, the ECtHR silently abstained from resorting to Article 31(3)(c). The examples analyzed in Part III.A.3, *supra*, indicate that, although systemic integration arguably functions effectively, its results as to the object and purpose of the ECHR are by no means predictable. The outcome ultimately depends on the will of the court and on the choices it makes in light of the circumstances of a particular case and of the broader political context in which the case arises. Although Article 31(3)(c) may be extremely useful to render the ECHR effective, it has equally been used by the court to limit its own jurisdiction and to avoid deciding cases. However, whether or not it is employed in favor of or against the effectiveness of the ECHR, the systemic integration technique neither justifies the application of double standards in ECtHR case law nor remedies the absence of legitimacy in its *dicta*.

Finally, although Article 31(3)(c) has often been promoted as a means to avoid *normative* fragmentation, Part III.B discussed a fourth and final category of cases in which the ECtHR has applied Article 31(3)(c) as a mechanism for preventing institutional fragmentation. Although strong conclusions cannot be drawn from a single case, reliance on Article 31(3)(c) enabled the court to reach its comity outcome in *Bosphorus*—an outcome that cannot not be explained in terms of positive international law nor be accommodated within it. The self-restraint the court voluntarily demonstrated in the name of systemic integration can find better explanation in legal pluralism,<sup>245</sup> and the institutional courtesy

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245. See generally *supra* note 242 and accompanying text. For an overview of the literature on legal pluralism, see Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1169–79 (2007).

that this pluralism entails. What, however, is evident is that the effectiveness of systemic integration in cases of institutional fragmentation may very well be limited by a number of imponderable external factors, such as the political dimensions of a case, the balance of power between the various fora, and the historical moment in which the cases arise.

As a result, the overall effectiveness of systemic integration as an anti-fragmentation method cannot be measured in absolute terms. Indeed, “the role of Article 31(3)(c) VCLT may have been inflated.”<sup>246</sup> The safest conclusion to reach is that the ECtHR may apply Article 31(3)(c) in a wide variety of ways, enjoying selectiveness which extends well beyond its discretion on whether or not to resort to it. The court is equally free to decide which ends its application will serve and which norms of international law it will introduce as “relevant” to its reasoning. Clearly, the Strasbourg Court is much more responsive to the spirit of Article 31(3)(c) than to its letter (and the limitations this approach entails). As a result, whether rightly or wrongly, the systemic integration technique can only be as effective as the ECtHR wants it to be. In the end, then, the court is the only body competent to decide how “special” or, conversely, how integrated into the systemic orthodoxy it wants to be.<sup>247</sup>

Describing in these terms the ECtHR’s use of Article 31(3)(c) gives rise to the question of whether the article might create a loophole facilitating judicial activism. Critics would emphasize that the ECtHR often resorts to Article 31(3)(c) in order to render possible a rather objectivist and less voluntarist reading of the Convention, that both expands the

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246. Van Damme, *supra* note 35, at 38. Van Damme suggests that “[i]rrespective of whether ‘systemic integration’ is called a concept, a principle, an approach, a technique, or an objective, the concrete meaning and status of ‘systemic integration’ in international law will eventually be developed and argued by practitioners and judges.” *Id.* at 27.

247. As Judge A.A. Cançado Trindade admits:

Generally recognised principles or rules of international law—which the formulation of the local remedies rule in human rights treaties refers to,—besides following an evolution of their own in the distinct contexts in which they apply, necessarily suffer, when inserted in human rights treaties, a certain degree of adjustment or adaptation, dictated by the special character of the object and purpose of those treaties and by the widely recognised specificity of the international law of human rights.

Caesar v. Trinidad & Tobago, 2005 Inter-Am. Ct. H.R. (ser. C) No. 123, at 299 (Mar. 11, 2005) (Cançado Trindade, J., separate opinion) (citations omitted). This is why, as has been argued by two eminent former judges of the European and the Inter-American Courts of Human Rights, the ECHR and the Inter-American Convention on Human Rights systems are on one hand, based on international law, instituted by international conventions, and therefore governed by the law of treaties, and on the other hand, their application may conflict with general international law. See Lucius Caflisch & Antônio A. Cançado Trindade, *Les conventions américaine et européenne des droits de l’homme et le droit international général*, 108 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 1, 60 (2004).

sphere of application of its substantive provisions and guarantees the effectiveness of its special *telos*.

The counterargument, however, is strong and moves in two directions. First, not all of the (implicit or explicit) applications of Article 31(3)(c) have enabled such a reading or outcome at all. Second, Article 31(3)(c) may allow activism no less or no more than any other method of interpretation meant to promote the object and purpose of a special international treaty. This second counterargument also explains why, in the case of complementarity between the ECHR and the relevant norms of international law, the systemic integration and dynamic techniques converge or even coincide. Both methods act, in substance, as a supplement to teleological interpretation, thereby increasing the legitimacy of the court's choice to give priority to the object and purpose of the Convention.

This is not the only case, however, where Article 31(3)(c) serves as a *servitore di due padroni*, accommodating both methods of interpretation under its umbrella. If evolution is to be inherent to a non-static legal order such as the international one, then the opening—by means of systemic integration—of the ECHR's box towards that order should be equally inherent. A systemic integration which is not done in the spirit of evolution would be, by definition, anachronistic and therefore defective, deficient, and imperfect.

Systemic integration corresponds, however, only to one of the two dimensions of evolutive interpretation. The evolutive/dynamic method extends beyond that of systemic integration, such as when ECtHR judges derive normative sources of inspiration from outside the international system. Although it may appear that the regime of the ECHR is evolving outside, or even in contradiction to the international legal order, one should recognize that, since the latter is the natural environment within which the ECHR operates, any deflection in its interpretation from that order triggers evolution within the international order and, evolution of the international order itself.<sup>248</sup> That is to say, when the systemic integration and the dynamic methods of interpretation do not converge, they interact circularly. This non-systemic expression of evolution falls outside Article 31(3)(c) and generates results even having the potential to challenge the normative unity of international law. Yet nothing excludes that this phenomenon will not be temporary—for a dynamic system such as the international legal order disposes of the means to both reject or integrate any kind of evolution. Finally, venturing a more general reflection on the overall function of Article 31(3)(c), it could be argued that

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248. See Luzius Wildhaber, *The European Convention on Human Rights and International Law*, 56 INT'L & COMP. L.Q. 217, 230–31 (2007).

the article provides an aperture into and out of the ECHR regime, through which the judges of Strasbourg can observe, consider, and possibly even integrate or modify broader international law. Ultimately this view cannot be but finite, and depends on a number of factors: the degree of maturity or compactness of the international system, the momentum within it, the distance separating the judge from her broader socio-normative environment, and, most of all, the intentions of the judicial forum. Yet even if judicial altruism could be taken for granted, undeniably the core of the fragmentation phenomenon—that is, the need in certain cases to set priorities between trade and environment, human rights and trade, etc.<sup>249</sup>—reflects, first and foremost, a certain discrepancy, divergence, or even fragmentation in the hierarchy of *values* that are the material source for those fragmented norms within the international arena.<sup>250</sup> By definition, then, the answer to a post-modern question must be equally post-modern.

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249. One must refer here to the very systematic work of Joost Pauwelyn, who discusses the relationship between international law and World Trade Organization law. Among several other works by this author, see Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 AM. J. INT'L L. 535 (2001). For a collection of essays on, more specifically, trade and human rights, see, for example, HUMAN RIGHTS AND INTERNATIONAL TRADE (Thomas Cottier et al. eds., 2005); PUBLICATIONS DE L'INSTITUT INTERNATIONAL DES DROITS DE L'HOMME, COMMERCE MONDIAL ET PROTECTION DES DROITS DE L'HOMME: LES DROITS DE L'HOMME À L'ÉPREUVE DE LA GLOBALISATION DES ÉCHANGES ÉCONOMIQUES (2001).

250. See Koskeniemi, *supra* note 11, at 16 (arguing that “[c]onstitutionalism, as we know it from the national context, relies on some basic understanding of the common good . . . . In the international world, there is no semblance of this beyond the languages of diplomacy and positive law, whose fragmentation and indeterminacy provided the starting-point for the search for an (implicit) constitution.”) (citation omitted).